EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 10/2

CASE NBR 85-1-02034 CSX
SHORT TITLE Kramer, Paul
VERSUS Horton, Frank E., etc.
DOCKETED: Jun 11 198

Date	Proceedings and Orders
Jun 11 1986	Petition for writ of certiorari filed.
Jul 8 1986	Brief of respondent Frank E. Horton, etc. in opposition filed.
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Oct 20 1986	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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85-2034 (1)

No.

IN THE

Supreme Court of the United States

October Term, 1985

PAUL KRAMER, *Petitioner,*

vs.

FRANK E. HORTON, CHANCELLOR OF THE UNIVERSITY OF WISCONSIN-MILWAUKEE, ROBERT W. CORRIGAN, DEAN OF THE SCHOOL OF FINE ARTS OF THE UNIVERSITY OF WISCONSIN-MILWAUKEE, and GERALD T. MCKENNA, CHAIRMAN OF THE DEPARTMENT OF MUSIC OF THE UNIVERSITY OF WISCONSIN-MILWAUKEE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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June 11, 1986

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QUESTIONS PRESENTED

1. May a state court require a plaintiff seeking relief under 42 U.S.C. §1983 to exhaust state administrative remedies before filing suit?

2. Does the mere existence of a state bureaucratic hierarchy provide a sufficient hearing and appeal mechanism to assure due process of law?

PARTIES

Petitioner in this Court is Paul Kramer, who was the plaintiff in the proceedings below. Respondents are Frank E. Horton, Robert W. Corrigan, and Gerald T. McKenna, all in their official capacities as Chancellor, Dean of the School of Fine Arts, and Music Department Chairman, respectively, at the University of Wisconsin-Milwaukee.

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IN THE

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

Petitioner Paul Kramer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Supreme Court entered in this case on March 13, 1986.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court, reported at 128 Wis.2d 404, 383 N.W.2d 54, appears in the Appendix at A-1. The opinion of the Wisconsin Court of Appeals, reported at 125 Wis.2d 177, 371 N.W.2d 801, appears in the Appendix at A-16.

JURISDICTION

The Wisconsin Supreme Court entered its decision on March 13, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution (art. VI, cl. 2) reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This case also involves 42 U.S.C. §1983 which, in relevant part, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This is a procedural due process case. Petitioner Paul Kramer is a tenured professor of music at the University of Wisconsin-Milwaukee ("UWM"). In August, 1979, he was summarily dismissed from his position as performing oboist in the UWM Woodwind Arts Quintet with no statement of reasons or hearing. He was demoted under circumstances which undermined his ability to obtain another position as a performing musician. He has not obtained a comparable performing role at the UWM or elsewhere, although he remains a tenured faculty member in the UWM Music Department.

Kramer came to the UWM in 1966 after many years of playing as a concert oboist with the Boston Symphony and other noted orchestras. He was attracted by written and oral assurances that he would be the core of a new artist-in-residence faculty woodwind group at the UWM.

He became the prime mover in recruiting other prominent woodwind performers to join the UWM Music Department and play with the group. The ensemble was completed in 1970 and took the name "UWM Woodwind Arts Quintet." Performances with the Quintet constituted a significant part of the members' official responsibilities to the UWM. Kramer, once characterized by Dean Corrigan as the "anchorman" of the Quintet, played continuously as the oboist of the group until the summer of 1979.

On July 21, 1979, the other members of the Quintet met with Kramer and demanded that he resign from the group. No written statement of reasons was given then or had been given previously. Kramer refused their demand. His dismissal from the Quintet was effectuated by Chairman Emanuel Rubin,[1] who

1. The respondents were sued only for injunctive relief in their official capacities. At the trial, the court granted plaintiff's oral motion to substitute Frank E. Horton for Leon M. Schur as Chancellor and Gerald T. McKenna for Emanuel Rubin as Department Chairman to comport with changes which occurred during the pendency of the case.

removed him from the Quintet and assigned him added teaching responsibilities. Again no statement of reasons was given to Kramer.

There were no established rules at the UWM which governed this situation, so Kramer wrote to the executive committee of the faculty (called the University Committee) on August 6 requesting them to review the matter. On Thursday, August 30, Kramer received a response suggesting that the Music Department Executive Committee should review the matter. Pet. App. A-37. Classes were to begin on Tuesday, September 4, the day after Labor Day, and his reassignment would become effective that day. The Department's Executive Committee could not meet before then.

Kramer commenced this action on September 4 in the Circuit Court for Milwaukee County. He alleged a deprivation of liberty and property interests without due process under the Fourteenth Amendment to the United States Constitution and requested interlocutory and permanent injunctive relief. The court granted an *ex parte* restraining order that day preventing the respondents from removing Kramer from the Quintet.[2]

Kramer had also asked the Music Department Executive Committee by letter that he be given a hearing with certain elements of due process such as the right to call witnesses and to cross-examine his adversaries. After the suit was filed, the Music Department Executive Committee decided to review Kramer's dismissal from the Quintet. A meeting of the Music Department Executive Committee was held on September 18 to discuss Kramer's removal from the Quintet. But at the meeting Kramer was given no statement of reasons, was not allowed to call or to cross-examine witnesses, and his counsel was permitted to speak only at the invitation of the Committee. The Committee decided that the chairman had acted within his authority

2. The restraining order was ultimately dissolved on October 1, 1979, in an order which also denied Kramer's motion for a temporary injunction.

in dismissing Kramer from the Quintet without any notice or hearing.

Meanwhile the respondents filed motions to dismiss the circuit court action on the grounds that, *inter alia,* Kramer had failed to exhaust his administrative remedies. Pet. App. A-38-42.[3] While the motions to dismiss were pending, Kramer served interrogatories asking the University officials what administrative review steps to follow because there were no existing rules or procedures for appealing the actions taken against him. The answers to the interrogatories stated that the first step was to ask for review by the Department Executive Committee. The initial review could be followed by an appeal to the Chancellor, but the Chancellor's decision "would not be subject to further administrative procedure." Pet. App. A-55-61. In accordance with the interrogatory answers, Kramer petitioned the Chancellor for review of the procedure by which he had been dismissed from the Quintet. The Chancellor affirmed the manner of Kramer's dismissal on October 29, 1980. Pet. App. A-62-64. The trial court denied the motions to dismiss on February 26, 1981. Pet App. A-65.

The case was tried without a jury in April, 1983. The defendants stipulated that Kramer had exhausted all available administrative procedures prior to trial. The court found that Kramer's liberty interest had been infringed by dismissal from the Quintet with no prior hearing and that the review given by the Music Department Executive Committee failed to afford Kramer due process Pet. App. A-66-70.

On appeal from the judgment ordering the UWM officials to give Kramer a hearing, the Wisconsin Court of Appeals affirmed the trial judge's denial of the motions to dismiss and his

3. Kramer filed an amended complaint on October 30, 1979. Pet. App. A-43-48. The UWM officials renewed their motions to dismiss on various grounds, including the failure to exhaust administrative remedies. Pet. App. A-49-54.

finding that Kramer's liberty interests had been violated without due process.[4] The Wisconsin Supreme Court accepted review and on March 13, 1986, reversed on the sole ground that Kramer did not exhaust all administrative remedies *before* bringing his civil rights suit in state court, even though he had pursued them to an unsuccessful conclusion while the suit was pending.

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD ISSUE BECAUSE THE DECISION BELOW CONFLICTS WITH THE ASSERTION OF FEDERAL RIGHTS PROVIDED BY THE FOURTEENTH AMENDMENT AND 42 U.S.C. §1983.

The Wisconsin Supreme Court's holding that a state court is free to impose an exhaustion requirement on a plaintiff before entertaining a suit under 42 U.S.C. §1983 interferes with the federal rights protected by that statute. The substantive right at issue in this case is provided by the Due Process Clause of the Fourteenth Amendment, not by §1983. *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 618 (1979). But §1983 provides a *judicial* remedy by creating a private cause of action to enforce the substantive rights granted by the Constitution. *Burnett v. Grattan,* 468 U.S. ____, 82 L.Ed.2d 36, 44 (1984).

4. The Appeals Court also ordered a remand for findings on the property interest issue which had not been clearly resolved by the trial court.

The remedy of access to court under §1983 is "independent of any other legal or administrative relief that may be available as a matter of federal or state law." *Id.* Congress' intent to provide separate and immediate access to court to protect constitutional rights without exhausting state administrative procedures is evident in the legislative history to §1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor to §1983. *Patsy v. Florida Board of Regents,* 457 U.S. 496, 502-507 (1982). This Court, having extensively reviewed the legislative history, stated unequivocally in *Patsy* that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to §1983." *Id.* at 516. The decision affirmed repeated pronouncements of the Court beginning with *McNeese v. Board of Education,* 373 U.S. 668 (1963), which had established a firm body of precedent before Kramer commenced his action in 1979. *See, e.g., Wilwording v. Swenson,* 404 U.S. 249 (1971); *Damico v. California,* 389 U.S. 416 (1967).

The legislative history which evinced congressional intent to provide an immediate avenue for judicial relief under §1983 also demonstrated that the jurisdiction to entertain suits under §1983 was not exclusively vested in the federal courts. *Patsy,* 457 U.S. at 506-507. State courts have concurrent jurisdiction to enforce federal constitutional rights protected by §1983. *Martinez v. California,* 444 U.S. 277, 283 n.7 (1980). The Wisconsin Supreme Court acknowledged in *Terry v. Kolski,* 78 Wis.2d 475, 254 N.W.2d 704 (1977), that the courts of Wisconsin have concurrent jurisdiction with the federal courts to hear claims under §1983.

When a federal cause of action is brought in state court, the Supremacy Clause prevents the state court from using procedural rules to frustrate congressional policies underlying the federal law. *Brown v. Western Railway,* 338 U.S. 294, 296 (1949); *Davis v. Wechsler,* 263 U.S. 22, 24 (1923). The *Brown* and *Davis* decisions involved the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.,* but the federal policies embodied in

the Civil Rights Act are no less protected by the Supremacy Clause from interference by state courts. The policy of §1983 is to permit a civil rights plaintiff the opportunity to go straight to court to protect federal rights. *Smith v. Robinson,* 468 U.S. ____, 82 L.Ed.2d 746, 764-65 n.14 (1984); *Patsy,* 457 U.S. at 503-504. The right of prompt access to court, especially where injunctive relief is sought, should not be emasculated by a state court under the guise of following a state-law rule which it chooses to denominate as "procedural."

Consistent with this general principle, state laws which are contrary to the goals of the Civil Rights Act may not be injected into a case brought under §1983 to defeat rights granted by that statute. In *Martinez v. California,* 444 U.S. 277, 284 n.8 (1980), this Court noted that a California statute conferring immunity on parole officials could not provide a defense to conduct actionable under §1983 because federal law must define the parties' rights under §1983. In *Maine v. Thiboutot,* 448 U.S. 1, 10 (1980), the authority to award attorney's fees under 42 U.S.C. §1988 was deemed an integral part of the remedies available to enforce the Civil Rights Act and therefore applied in a §1983 action brought in the courts of Maine, notwithstanding that §1983 makes the attorney's fees part of the costs, a subject usually regarded as controlled by local rules of procedure.

The Wisconsin Supreme Court justified its departure from the clear holding of *Patsy* by characterizing its application of the exhaustion doctrine as part of the "procedural scheme under which claims may be heard in state court." 128 Wis.2d at 417. The effect, however, was to deny Kramer access to court, a fundamental aspect of the rights conveyed by §1983. The lower court's ruling is in direct conflict with those federal rights.

The conflict is particularly egregious in this case because the trier of fact found that Kramer's constitutional rights had been violated. This finding was affirmed on appeal by the court with primary responsibility to review the evidence, the Wisconsin

Court of Appeals. The circuit court and court of appeals also agreed that Kramer had in fact exhausted all administrative procedures.

Having had his constitutional rights violated, having no known avenue of administrative relief available, facing irreparable injury from the dismissal before any administrative body could meet, Kramer exercised his right to seek relief in court under §1983. He did not abandon efforts to get relief through the administrative process. He asked by interrogatory what administrative review steps could be taken, he followed them, and he got no relief. The Wisconsin Supreme Court barred him from the courthouse not because he ultimately got relief at the administrative level but because he made the effort and didn't finish it before starting suit. His frustration demonstrates what Congress sought to avoid by making a supplementary remedy immediately available in court under §1983 to redresss constitutional violations. *See Patsy,* 457 U.S. at 503-506.

II.

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION BELOW WILL DISCOURAGE CIVIL RIGHTS LITIGANTS FROM USING STATE COURTS AND THEREBY FRUSTRATE PRINCIPLES OF FEDERALISM.

The state courts have concurrent jurisdiction over cases brought under §1983. *Thiboutot,* 448 U.S. at 3 n.1; *Martinez,* 444 U.S. at 284 n.7. State courts may be more convenient to lawyers and their clients, and encouraging the use of state courts to litigate civil rights claims will alleviate the caseload volume in the federal courts. *See Patsy,* 457 U.S. at 533 (Powell, J., dissenting). State judges are obligated to guard and enforce every right granted by the U.S. Constitution, *Steffel v. Thompson,*

415 U.S. 452, 460-61 (1974), and there is no reason to assume that the state courts cannot effectively and efficiently carry out that responsibility by presiding over §1983 actions.

However, if the state courts erect procedural bars not present in the federal courts, the potential for substantial participation by the state courts in handling civil rights cases will be truncated as litigants chose the preferred federal forum. *See* Steinglass, *The Emerging State Court §1983 Action: A Procedural Review,* 38 U. Miami L. Rev. 381, 387-88 (1984). The Wisconsin Supreme Court's decision in this case will certainly discourage a plaintiff from filing a §1983 action in state court.

There were no existing procedural avenues for Kramer to follow. There were only hierarchical layers of bureaucracy to whom he could make inquiry as to how to proceed. What administrative review could be granted was unknown and only became more definitive through the discovery process in the litigation. The procedures defined during discovery were followed, but proved to be unresponsive. Yet the Wisconsin Supreme Court dismissed the case for failure to exhaust these uncertain administrative procedures prior to filing suit. That decision, if unreviewed, will send a clear signal to prospective plaintiffs to bring their court action in the federal system where they will not risk dismissal at the hands of state courts who require exhaustion of rules imposed after the fact by an administrative bureaucracy.

Underutilization of the state courts to resolve civil rights litigation will not be the only negative impact on the relations between state and federal courts arising from the imposition of an exhaustion rule in state courts. The state courts that require exhaustion will be confronted with thorny subissues such as whether statutes of limitation for filing claims with administrative agencies will be applicable,[5] what tolling rules will be in effect while the administrative process is completed,[6] and what res judicata and collateral estoppel effect will be given to administrative agency decisions.[7]

These kinds of questions will inevitably lead to further differences in the treatment received by litigants in state court as opposed to federal court, thus encouraging forum shopping. There will also be different burdens facing parties in the courts of different states. This Court may be increasingly called upon to resolve the very kinds of difficult questions arising in the exhaustion context that were sought to be avoided by the straightforward rule adopted in *Patsy*. 457 U.S. at 513-514. Review should be granted now to clarify the extent to which state courts can apply these complicated and often inconsistent rules to civil rights actions.

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5. *Compare Mills v. County of Monroe,* 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456 (1983), *cert. denied,* 464 U.S. 1018 (1983) (failure to file employment discrimination claim within 90-day requirement of municipal claims statute bars civil rights suit) *with Burnett v. Grattan,* 468 U.S.____, 82 L.Ed.2d 36 (1984) (state statute of limitations for filing claims with an administrative agency held inappropriate for actions under the Civil Rights Acts in federal court).

6. If the state rule does not toll the statute of limitations, such as the New York rule applied in *Board of Regents v. Tomanio,* 446 U.S. 478 (1980), the statute of limitations might run while the administrative process is being completed. The plaintiffs only remedy would be an administrative review statute, if available, which would eliminate the remedy supposedly provided by §1983.

7. This issue is currently being reviewed in *University of Tennessee v. Elliott,* 766 F.2d 982 (6th Cir. 1985), *cert. granted,* 54 U.S.L.W. 3374 (U.S. Dec. 2, 1985) (No. 85-588).

III.

A GROWING CONFLICT AMONG THE DECISIONS OF STATE APPELLATE COURTS SHOULD BE RESOLVED BY GRANTING THE WRIT.

The initial reaction of state appellate courts confronted with the issue of failure to exhaust administrative remedies in a civil rights action was to follow the rule of *Patsy* and its predecessors that exhaustion was not a prerequisite. *See, e.g., Williams v. Horvath,* 16 Cal.3d 834, 129 Cal.Rptr. 453, 548 P.2d 1125 (1976); *Fetterman v. University of Connecticut,* 192 Conn. 539, 473 A.2d 1176 (1984); *Overman v. Klein,* 103 Idaho 795, 654 P.2d 888 (1982); *Stratos v. Department of Public Welfare,* 387 Mass. 312, 439 N.E.2d 778 (1982); *O'Connors v. Helfgott,* 481 A.2d 388 (R.I. 1984). The principal exception to this trend had been the courts of Indiana, which regarded the "no-exhaustion" rule of the federal courts as a procedural matter not binding on the state courts. *Clark v. Indiana Department of Public Welfare,* 478 N.E.2d 699 (Ind.App. 1985), *petition for cert. filed,* 54 U.S.L.W. 3717 (U.S. April 16, 1986) (No. 85-1706); *State ex rel. Basham v. Medical Licensing Board,* 451 N.E.2d 691 (Ind.App. 1983); *Thompson v. Medical Licensing Board,* 180 Ind.App. 333, 398 N.E.2d 43 (1983), *cert. denied,* 449 U.S. 937 (1980).

The decision of the Wisconsin Supreme Court is one of three recent decisions by state appellate courts running counter to the earlier trend to adhere to the "no-exhaustion" principle established in the federal courts. In *Clark, supra,* the Indiana Court of Appeals extended the rationale of prior holdings requiring exhaustion of administrative agency procedures to also require exhaustion of the Indiana Tort Claims Act administrative remedies. In the third case, the California Court of Appeals ordered the plaintiff's reverse discrimination claim under §1983 to be dismissed for failure to exhaust appeal procedures available under that state's Fair Employment Practices Act. *Caylor v. City of Red Bluff,* No. 20852 (Cal.Ct.App. 1985), *cert. denied,* 88 L.Ed.2d 583 (1985). The ruling below

goes beyond the holdings of the Indiana and California courts by requiring exhaustion even where there were no clearly-defined avenues of administrative review available.

The conflict among the state courts as to whether and to what extent exhaustion should be required is growing. Even within a given state, distinctions are being made which may lead to disparity in treatment of plaintiffs depending on the nature of their civil rights claim. *Compare Logan v. Southern California Rapid Transit District,* 136 Cal.App.3d 116, 185 Cal.Rptr. 878 (1982) (not requiring exhaustion before bringing §1983 action for due process violation, citing *Patsy*) *with Clark, supra* (exhaustion of state Fair Employment Practices Act procedures required before filing discrimination case) *and Bartschi v. Chico Community Memorial Hospital,* 137 Cal.App.3d 502, 187 Cal.Rptr. 61 (1982) (*Patsy* does not bar exhaustion requirement in state court where §1983 claims were "tenuous").

The question of whether *federal* law permits state courts to impose an exhaustion requirement on §1983 claimants should be resolved by this Court to promote uniformity and efficiency among all courts confronted with this federal question. Review should be granted to prevent the further growth of inconsistent and contradictory decisions by state courts interpreting the content of the federal statute.

IV

THE WRIT SHOULD ISSUE BECAUSE THE DISMISSAL OF A §1983 CLAIM FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES VIOLATES DUE PROCESS WHEN NO REMEDIES EXIST BEYOND THE MERE EXISTENCE OF A STATE BUREAUCRATIC HIERARCHY.

Kramer had no known right to an administrative hearing on his dismissal. There were no statutes, administrative rules or published faculty guidelines that gave any guidance on how to appeal. No person or group had been given jurisdiction to hear or rule on his challenge. There were no set procedures.

All Kramer could do was ask, which he did. He asked the University Committee, but they sent him to the Music Department Executive Committee. At his request that committee discussed his case at a meeting but ratified the decision.

Only after he went to court to save his job was Kramer told that he should have done more. The respondents moved to dismiss his case because he had not exhausted administrative remedies. Even then he was not told what those remedies were. He had to serve interrogatories to find out.

In the answers to his interrogatories Kramer was told, without support in any rule, publication, or custom, that in addition to the right to a review by the Music Department Executive Committee he had a right to appeal to the Chancellor. Having already done the former, he immediately did the latter and once again was turned down.

Both the trial court and the Court of Appeals agreed that under these circumstances Kramer had not failed to exhaust any remedies. The Wisconsin Supreme Court, however, ruled that Wisconsin law required Kramer to petition the Executive Committee and appeal to the Chancellor before he would have the right to go to court. In effect the Wisconsin Supreme Court said that Kramer could not assert his federal constitutional rights in a Wisconsin court without first following procedures that were not published in appeals to tribunals that nobody knew had jurisdiction. This put Kramer in the awkward position of being told that he had no right to start the lawsuit that enabled him to file his interrogatories because he had not first followed the administrative procedures that he did not know about until those interrogatories were answered.

At the time Kramer had to decide how to challenge his dismissal, the only clue he had about what to do was the fact that a bureaucratic hierarchy existed at the UWM. There is a hierarchy in every government agency. If that is enough to create a right and an obligation to appeal, no constitutional violation will ever be able to be challenged in a state court until the highest executive in the agency has been petitioned.

The administrative review mechanism approved by the Wisconsin court offends virtually every principle of procedural justice that this Court has held to be fundamental.Kramer had no prior public notice of who had jurisdiction and how that jurisdiction was to be invoked.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time in a meaningful manner.' " *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). "[T]he right to a meaningful opportunity to be heard ... must be protected against denial by particular laws that operate to jeopardize it for particular individuals." *Boddie v. Connecticut,* 401 U.S. 371, 379-80 (1971). The Wisconsin court has held that Kramer had that meaningful opportunity simply because there existed a Department Chairman, a Department Executive Committee, and a Chancellor at his university.

In reality, since the mere existence of this bureaucracy was the only administrative "remedy" available to people in Kramer's position, his opportunity to exhaust that "remedy" before going to court to protect his constitutional rights was less than "meaningful," it was nonexistent. He cannot be expected to have done something he had no way of knowing about.

This is not a mere procedural step that could easily have been taken. Like the filing fee in *Boddie* and the notice-by-publication in *Mullane v. Central Hanover Trust Company,* 339 U.S. 306 (1950), the requirement that Paul Kramer exhaust a nonexistent remedy deprived him of his opportunity to be heard.

Congress did not lightly give state courts the right to hear §1983 cases. That right should not be lightly regarded by those courts.

When Wisconsin opened its courts to §1983 claimants in *Terry v. Kolski, supra,* 78 Wis.2d 475, it assumed an obligation to treat each of those claimants with due process. "The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather the State owes to each individual that process which, in light of the values of a free society, can be characterized as due." *Boddie, supra,* at 380.

That is what Paul Kramer has been denied. Review should be granted to remedy that denial and to ensure that exhaustion of remedies, if it is to be required in state-court §1983 cases, will be required only when procedures and tribunals have been established with sufficient clarity to make the administrative remedies meaningful.

CONCLUSION

The decision below is in direct conflict with the rights granted by 42 U.S.C. §1983 as interpreted in *Patsy v. Florida Board of Regents.* The decision discourages plaintiffs from using the state courts to litigate civil rights claims and undercuts principles of federalism which foster the availability of state courts for the full protection of federal constitutional rights. The decision also adds to a growing split between the highest courts of many states on the issue of whether the "no-exhaustion" rule of *Patsy* is binding on the state courts. Finally, the Wisconsin Supreme Court's decision denied Kramer due process by requiring that he exhaust a nonexistant administrative remedy. For all of these reasons, the writ of certiorari should be granted to review this case.

Respectfully submitted,

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June 11, 1986

Appendix

Paul KRAMER, Plaintiff-Respondent and Cross-Appellant,

v.

Frank E. HORTON, Chancellor of the University of Wisconsin-Milwaukee, Robert W. Corrigan, Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, and Gerald T. McKenna, Chairman of the Department of Music of the University of Wisconsin-Milwaukee, Defendants-Appellants and Cross-Respondents-Petitioners.

Supreme Court

No. 84-762. Argued February 10, 1986.—Decided March 13, 1986.

(Reversing 125 Wis. 2d 177, 371 N.W.2d 801 (Ct. App. 1985).)

1. **Appeal and Error § 625*—review of question of law—deference to trial court.**

   Applying given rule of law to stipulated facts is question of law and, upon review, reviewing court need not defer to lower courts' reasoning.

2. **Civil Rights § 25*—exhaustion of remedies—constitutionally inadequate administrative remedies.**

   While court of appeals was correct in noting that exhaustion of remedies is not mandatory in § 1983 cases, court of appeals' conclusion that plaintiff can escape exhaustion requirement merely by alleging that available adminstrative remedies are constitutionally inadequate overlooked case law to contrary.

3. **Civil Rights § 25*—exhaustion of remedies—powers reserved to states—state interests.**

   While Constitution vests in Congress power to prescribe basic procedural scheme under which claims may be heard in federal courts, it reserves to state legislatures and courts

the power to prescribe the procedural scheme under which claims may be heard in state court, and considerations of comity and federalism dictate that state court faced with § 1983 claim based on state administrative action must weigh different interests than federal court in deciding to apply exhaustion of remedies doctrine.

4. **Civil Rights § 25*—exhaustion of remedies—application to state § 1983 claims—state interests.**

State courts may require exhaustion of state administrative remedies as prerequisite to § 1983 cases brought in state court in view of strong state interest in continued adherence to exhaustion doctrine in that doctrine of exhaustion serves as measure of respect for integrity of administrative procedural process, compliments state's progressive tradition, provides state agencies with opportunity to correct their own errors, promotes judicial efficiency by preventing premature judicial incursions into agency activities and, is not inherently inconsistent with purposes of § 1983 as exhaustion doctrine applies only when administrative remedies are adequate and readily available.

5. **Civil Rights § 25*—exhaustion of remedies—application to state § 1983 claims—exceptions to exhaustion requirement.**

To escape exhaustion of remedies requirement in § 1983 cases brought in state court and based on actions of state agencies, party must prove that administrative body either cannot or will not afford him adequate relief, and absent evidence that reviewing agency is inherently biased, or that agency is delaying review unnecessarily, plaintiff's naked assertion that available administrative remedies are inadequate is insufficient to negate general rule requiring exhaustion.

6. **Civil Rights § 51*—exhaustion of remedies—application to state § 1983 claims—proof of inadequate available administrative remedies.**

In view of ruling that plaintiff seeking § 1983 relief in state court founded on action of state administrative agencies must exhaust administrative remedies prior to filing § 1983 suit, in § 1983 action brought in state court where university professor alleged that department chairman's decision to reassign him violated due process in suit filed prior to exhausting available administrative remedies, trial court erroneously allowed action to proceed as plaintiff failed to prove that available administrative remedies were inadequate, or that university was delaying review of reassignment, or was unable or unwilling to review such reassignment, or was biased in some way.

REVIEW of a decision of the Court of Appeals. *Reversed.*

For the petitioners the cause was argued by *LeRoy L. Dalton,* assistant attorney general, with whom on the briefs was *Bronson C. La Follette,* attorney general.

For the plaintiff-respondent and cross-appellant there was a brief by *Dennis L. Fisher, Susan J. Marguet* and *Meissner, Tierney, Ehlinger & Whipp, S.C.,* Milwaukee, and oral argument by *Mr. Fisher.*

Amicus curiae brief was filed by *Bruce Meredith,* staff counsel, and Wisconsin Education Association Council.

WILLIAM G. CALLOW, J. The defendants, Frank Horton, Chancellor of the University of Wisconsin-Milwaukee, Robert Corrigan, Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, and Gerald McKenna, Chairman of the Department of Music of the University of Wisconsin-Milwaukee, all in an official representative capacity (University), seek review of a published decision of the court of appeals *Kramer v. Horton,* 125 Wis. 2d 177, 371 N.W.2d 801 (Ct. App. 1985). The court of appeals affirmed a judgment of the circuit court for Milwaukee county, Judge Harold B. Jackson, Jr., in which the circuit court ordered a "name-clearing" hearing for the plaintiff, Paul Kramer, a tenured pro-

fessor in the Department of Music and awarded him $38,654.17 for attorney fees, expenses, and disbursements, under 42 U.S C. sec. 1988 (1976). The parties raise numerous issues on appeal, but one issue is dispositive: whether Kramer should have exhausted his administrative remedies prior to instituting this suit. Because we conclude that he should have exhausted his administrative remedies before commencing this action, we reverse the decision of the court of appeals.

In 1965 Paul Kramer, an oboist who had spent several years as a concert musician with the Boston Symphony and other orchestras, contacted the Chairman of the Department of Music at the University of Wisconsin-Milwaukee (Department) about a possible opening on the faculty for an oboist. He auditioned in the spring of 1966. The Dean of the School of Fine Arts sent him a letter of appointment later that year. The letter stated: "In addition to teaching general and applied music, your services to the university will include performing." Apparently, the Dean and Kramer had discussed the possibility of forming a woodwind quintet, composed entirely of faculty members of the Department. When Kramer accepted the appointment, the Woodwind Arts Quintet did not exist.

With the Dean's support, Kramer helped organize the Woodwind Arts Quintet (Quintet) and actively participated in recruiting members. The formation of the all-faculty Quintet was completed in October, 1970. Beginning in 1971, members of the Quintet received formal release time from a portion of their teaching responsibilities to allow them to rehearse and perform.

Kramer received tenure and became an associate professor in 1971. In 1975 he was promoted to the position of full professor in the Department. Kramer was a member of the Quintet from 1970 until 1979 when the Chairman of the Department reassigned him to full-time teaching responsibilities which denied him the opportunity to participate in the Quintet. Believing he was treated unfairly in being reassigned, Kramer commenced this lawsuit.

Although most of the events surrounding Kramer's reassignment took place in July and August of 1979, problems within the Quintet had emerged as early as November, 1977. At a rehearsal of the Quintet in November, 1977, members of the Quintet criticized Kramer's performance at a prior concert during which he played with a cracked reed in his oboe. They discussed with Kramer their concerns about performance problems, rehearsal problems, stage mannerisms, and reed problems. They informed Kramer that his performance in the group was "unacceptable" because his playing was not up to the level it should be.

On more than one occasion between November, 1977, and July, 1979, members of the Quintet again expressed criticism of Kramer and voiced their concerns to him. Because the other members of the Quintet did not perceive any improvement on Kramer's part during this period, they became increasingly dissatisfied. Finally, in the summer of 1979, they concluded that they could not continue playing in the Quintet with Kramer.

The frustrations of the other members of the Quintet culminated in a confrontation with Kramer on July 21, 1979, when the Quintet held a meeting at which the other members of the Quintet asked Kramer to resign from his position in the Quintet. Once again the Quintet members expressed to Kramer the basis for their dissatisfaction, but they did not provide him with a written statement of reasons for his requested resignation. Kramer refused to resign.

Kramer raised objections to his proposed removal with the Chairman of the Department and with the Dean of the School of Fine Arts, but to no avail. The Chairman, who was aware of the discontent of the other members of the Quintet, explained to Kramer that he could not conceive of a meaningful way to force a chamber music group to play with a member in whom they had no confidence. Believing it would serve the best interests of the University and the Quintet, the Chairman reassigned Kramer's time from rehearsing to teaching.

After learning of his reassignment, Kramer filed a grievance petition with the University Committee, the faculty executive committee for the entire University. The University Committee responded on August 29, 1979, informing Kramer that the Executive Committee of the Department was the appropriate forum in which to seek initial review of his reassignment. On September 4, 1979, the first day of class in the 1979–80 school year, Kramer commenced this lawsuit.

Kramer appealed his reassignment to the Executive Committee of the Department on September 7, 1979. On September 18, 1979, the Executive Committee convened a special meeting at which it reviewed the decision to reassign Kramer from rehearsing to additional teaching. Kramer did not receive a written statement of the reasons for his reassignment either prior to or at this meeting. The Executive Committee, however, did give him an opportunity to present his side of the story. He also was allowed to have counsel present, although neither he nor his counsel was permitted to call witnesses, cross-examine speakers, or introduce evidence.

On September 26 the Executive Committee issued a written report in which it affirmed that the Chairman had acted within the jurisdiction of his office in reassigning Kramer to fulltime teaching duties. According to the report, the Executive Committee found adequate support for the decision and believed the decision served the best interests of the Department.

Kramer appealed to the Chancellor in March, 1980, challenging the Executive Committee's decision on both substantive and procedural grounds. In a letter dated October 29, 1980, the Chancellor denied Kramer's appeal. Kramer did not appeal the Chancellor's decision to the Board of Regents.

In his initial complaint, filed on September 4, 1979, Kramer claimed that the University had deprived him of his property right in the Quintet position in violation of the United States Constitution and the Wisconsin Constitution. Kramer filed an amended complaint on October 30, 1979, further alleging that the University deprived him of a property right and a liberty

interest in violation of the fourteenth amendment to the Constitution. He asked for equitable relief under 42 U.S.C. sec. 1983 and for attorney fees under 42 U.S.C. sec. 1988. Finally, he asserted a second cause of action alleging a violation of the Wisconsin Administrative Code, UWS sec. 6.01 (1975).

After denying the defendants' motions to dismiss and the defendants' motion for summary judgment, the circuit court held a trial in April, 1983. At trial several witnesses testified regarding damage to Kramer's reputation resulting from his removal from the Quintet. In October, 1983, the court decided that the University did not provide Kramer with due process because it did not give him an adequate hearing prior to or subsequent to his reassignment to fulltime teaching. Specifically, the court held the University violated due process because it failed to provide Kramer with a written statement of the reasons for his reassignment and did not allow Kramer to call his own witnesses or cross-examine other witnesses.

The court entered judgment for Kramer in February, 1984, requiring that the University conduct a "name-clearing" hearing, pursuant to *Board of Regents v. Roth,* 408 U.S. 564 (1972), to rectify any harm to Kramer s liberty interest. Further the court also entered judgment against the defendants in the amount of $38,654.47 to cover Kramer's costs, including reasonable attorney fees and reimbursement of expenses and disbursements.

The University appealed the circuit court's judgment; Kramer cross-appealed claiming the circuit court should have found a property interest in addition to a liberty interest.[1] The court of appeals issued its decision in May, 1985, affirming the judgment of the circuit court.

Specifically, the court of appeals upheld the circuit court's denial of the defendants' two motions to dismiss. With regard to the defendants' assertion that Kramer failed to comply with the notice of claim statute, sec. 895.45, Stats. 1977, the court of appeals ruled that compliance is not required on a sec. 1983 action, citing *Perrote v. Percy,* 452 F. Supp. 604 (E.D. Wis.

1978). With regard to the defendants' assertion that Kramer failed to exhaust administrative remedies, the court similarly noted that exhaustion of administrative remedies is not mandatory in a sec. 1983 action, citing *Castelaz, v. Milwaukee,* 94 Wis. 2d 513, 534-35, 289 N.W.2d 259 (1980).

On the due process question, the court of appeals affirmed the circuit courts' ruling that the University deprived Kramer of a protected liberty interest without due process of law. The court of appeals also affirmed the circuit court's award of attorney fees. Finally, the court of appeals remanded the case and instructed the circuit court to determine whether Kramer had a property interest and, if so, whether the University deprived him of property without due process.

The defendants petitioned for review of the court of appeals' decision. In appealing to this court, the defendants again challenge both the lower courts' denials of their motion to dismiss and the courts' substantive decisions regarding due process. In an order issued on September 10, 1985, we granted review.

The defendants claim Kramer's complaint shows that the administrative action he commended in August, 1979, was still in progress when he filed suit on September 4, 1979. Relying upon *Nodell Investment Corp. v. Glendale,* 78 Wis. 2d 416, 424, 254 N.W.2d 310 (1977), the defendants argue that, because Kramer failed to exhaust administrative remedies before filing suit, the courts erred in not dismissing his action. For further support, defendants cite *Castelaz v. Milwaukee, supra,* a case similar to the instant case wherein the court stated that exhaustion of adminsitrative remedies should be required whenever there exists adequate administrative remedy.

Kramer initially argues that *Patsy v. Board of Regents,* 457 U.S. 496 (1982), controls this case. In *Patsy* the Supreme Court held that plaintiffs pursuing sec. 1983 claims in federal court need not exhaust administrative remedies. If we decline to apply the federal rule set forth in *Patsy* and decide to apply the general rule requiring exhaustion of adminsitrative remedies, Kramer

contends that three exceptions to the general rule apply to this case. He argues that the court should not require exhaustion of administrative remedies because (1) his challenge is primarily based on the inadequacy of the administrative remedy; (2) a substantial constitutional question is involved; and (3) recourse to the administrative agency is futile. *See Castelaz,* 94 Wis. 2d at 535; *Nodell Investment Corp.,* 78 Wis. 2d at 425 n. 12. In the alternative, Kramer contends that he exhausted all available administrative remedies.

In deciding whether to require exhaustion of administrative remedies in this case, the court of appeals, relying upon our statements in *Castelaz,* concluded that exhaustion is not mandatory in sec. 1983 cases. The court of appeals found that in *Castelaz* we implicitly recognized that courts should not require exhaustion in this type of case, wherein the plaintiff alleges that the available administrative procedures are constitutionally inadequate. The court of appeals further buttressed its decision by noting that the Supreme Court is *Patsy* "concluded that exhaustion of state administrative remedies ought not to be required as a prerequisite to bringing an action in federal court pursuant to sec. 1983." *Kramer v. Horton,* 125 Wis. 2d at 187.

[1]

Applying a given rule of law to stipulated facts is a question of law. *First National Leasing Corp. v. Madison,* 81 Wis. 2d 205, 208, 260 N.W.2d 251 (1977). When reviewing a question of law, this court need not defer to the lower courts' reasoning. *Milwaukee Metropolitan Sewerage District v. DNR,* 126 Wis. 2d 63, 71, 375 N.W.2d 648 (1985).

[2]

While the court of appeals was correct in noting that exhaustion is not mandatory in sec. 1983 cases, our decision in *Castelaz* does not support the court of appeals' conclusion that a plaintiff can escape the exhaustion requirement merely by alleging that the available administrative remedies are constitutionally inadequate.

In *Nodell Investment Corp. v. Glendale, supra,* we stated the general rule that courts should deny judicial relief "until the

parties have exhausted their administrative remedies; the parties must complete the administrative proceedings before they come to court." 78 Wis. 2d at 424. We noted that the exhaustion rule is premised on the assumption that an administrative remedy which will protect the party's claim of right is readily available to the party on his initiative. *Id.* We also acknowledged, however, that numerous exceptions to the rule of exhaustion come into play when the reasons supporting the exhaustion rule are not present. *Id.* at 425–26.

Because the plaintiff in *Castelaz v. Milwaukee* joined a sec. 1983 claim with state claims, *Castelaz* presented this court with an opportunity to discuss the exhaustion doctrine delineated in *Nodell Investment Corp.* in the context of sec. 1983 claims brought in state court. To assist our analysis we reviewed the Supreme Court decisions on exhaustion in sec. 1983 cases brought in federal court.

We found that in *Monroe v. Pape,* 365 U.S. 167 (1961), the Court applied a "no exhaustion" rule, allowing plaintiffs to pursue a sec. 1983 claim in federal court without requiring prior exhaustion of state judicial remedies. *Castelaz,* 94 Wis. 2d at 534. We noted that in subsequent decisions the Court appeared to expand the "no exhaustion" rule of *Monroe* to allow plaintiffs to pursue sec. 1983 claims in federal court without requiring prior exhaustion of either state judicial remedies or state administrative remedies. *Id.; see, e.g., Gibson v. Berryhill,* 411 U.S. 564 (1973); *Houghton v. Shafer,* 392 U.S. 639 (1968); *McNeese v. Board of Education,* 373 U.S. 668 (1963). Due to the inadequacy of the available state administrative remedies in these cases, however, exhaustion would not have been required even absent the federal "no exhaustion" rule. *Castelaz,* 94 Wis. 2d at 534-36. *See* Note, *Developments in the Law—Section 1983 and Federalism,* 90 Harv. L. Rev. 1133, 1274 (1977).

We concluded, therefore, that the Court had "expressly left open the question whether the no-exhaustion rule in [sec.] actions is 'invariably the case' when the administrative procedure is clear and adequate." *Castelaz,* 94 Wis. 2d at 536.

Accordingly, we held that state courts may require exhaustion of administrative remedies in sec. 1983 cases in State court, essentially reaffirming our statement in *Nodell Investment Corp.* that courts should allow plaintiffs to pursue claims without requiring prior exhaustion of administrative remedies only when exceptions to the exhaustion doctrine are applicable. Because *Castelaz* failed to allege that the available procedures were inadequate or that the review board was biased, we held that he "was required to exhaust his administrative remedies prior to seeking relief in state courts under [sec.] 1983." *Id.* at 535–36.

Since our decision in *Castelaz,* the Supreme Court again has had the opportunity to discuss exhaustion of administrative remedies in the context of sec. 1983 actions in federal court. In *Patsy v. Board of Regents,* 457 U.S. 496 (1982), the Supreme Court, reversing a decision of the Fifth Circuit Court of Appeals in which the fifth circuit adopted a flexible exhaustion test, stated that it had on numerous occasions, beginning with *McNeese v. Board of Education,* 373 U.S. 668, 671–73 (1963), rejected the argument that federal courts should dismiss sec. 1983 actions when the plaintiff fails to exhaust state administrative remedies. 457 U.S. at 500. While the Court acknowledged that it could have based several of its decisions on traditional exceptions to the exhaustion doctrine, it reiterated "that exhaustion is not a prerequisite to an action under [sec.] 1983," and stated that it had "not deviated from that position in the 19 years since *McNeese.*" *Id.* at 500–01. The Court also based its holding on policy grounds and on its perception of the legislative history of sec. 1 of the Civil Rights Act of 1871, the precursor to sec. 1983, although the Court acknowledged that "the 1871 Congress was not presented with the question of exhaustion of administrative remedies." *Id.* at 507.

This case presents us with the opportunity to discuss the doctrine of exhaustion in the context of sec. 1983 claims for only the second time since our decision in *Terry v. Kolski,* 78 Wis. 2d 475, 254 N.W.2d 704 (1977), in which we opened the doors of state courts to sec. 1983 claimants by acknowledging that

Wisconsin courts have concurrent jurisdiction with federal courts to hear claims brought under sec. 1983. As we explained above, in *Castelaz v. Milwaukee,* decided two years prior to *Patsy,* we held that a plaintiff bringing a sec. 1983 action in state court must exhaust his administrative remedies prior to commencing his sec. 1983 action. This case offers us an opportunity to reconsider *Castelaz* in light of the Supreme Court's ruling in *Patsy.* In deciding whether to continue to require plaintiffs to exhaust state administrative remedies prior to commencing a sec. 1983 claim in state court, however, we need not feel constrained by the Supreme Court's ruling in *Patsy* bacause *Patsy* concerned a sec. 1983 claim brought in federal court.

[3]

While the Constitution vests in Congress "the power to prescribe the basic procedural scheme under which claims may be heard in federal courts," *Patsy,* 457 U.S. at 501, it reserves to the state legislatures and state courts the power to prescribe the procedural scheme under which claims may be heard in state court. *See,* U.S. const. amend. X. Considerations of comity and federalism dictate that a state court faced with a sec. 1983 claim must weigh different interests than a federal court when deciding whether to apply the exhaustion doctrine.

In a sense, our adherence to the exhaustion doctrine serves as a measure of our respect for the integrity of the procedural process which Wisconsin's administrative agencies afford to its citizens. With its progressive tradition, the Wisconsin legislature has afforded its citizens strong administrative protections throughout its history. This proud tradition undergirds our holding in *State ex rel. First National Bank v. M & I Peoples Bank,* 82 Wis. 2d 529, 544–45, 263 N.W.2d 196 (1978), in which we discussed *Nodell Investment Corp.* and stated "that parties must exhaust administrative remedies before seeking judicial review of allegedly unconstitutional administrative agency action if the action challenged can be remedied in the administrative agency."

Indeed, the doctrine of exhaustion of administrative remedies complements our progressive tradition. It provides state agencies with the opportunity to correct their own errors and prevents premature judicial incursions into agency activities. In addition, the doctrine of exhaustion promotes judicial efficiency. Conflicts often are resolved without resort to litigation. Further, if a case is not resolved in the agency, the process of agency review provides the court with a greater clarification of the issues and a more complete factual record.

Further, the doctrine of exhaustion is not inherently inconsistent with the purposes of sec. 1983. The exhaustion doctrine applies only when administrative remedies are adequate and readily available. *Nodell Investment Corp.,* 78 Wis. 2d at 424. If the administrative remedies are patently inadequate, or are adequate in theory but not practice due to bias or delay, then the basis for applying the exhaustion doctrine does not exist, and one of the exceptions should allow the plaintiff to escape from the clutches of bureaucratic tyranny. *Id.* at 425 n. 12.

Moreover, exhaustion does not foreclose access to the federal courts. Under *Patsy,* a sec. 1983 plaintiff can elect to pursue a claim in federal court without exhausting administrative remedies. In addition, a sec. 1983 plaintiff can pursue a claim in federal court even after exhausting state administrative remedies because res judicata and collateral estoppel do not attach to state administrative agency determinations. *See,* Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases,* 41 U. Chi. L. Rev. 537, 551 (1974).

[4]

Because we find a strong state interest in our continued adherence to the exhaustion doctrine and because we believe that requiring exhaustion of state administrative remedies is not inconsistent with the purposes of sec. 1983, we affirm our holding in *Castelaz.* When state administrative remedies are adequate and readily available, a plaintiff brining a sec. 1983 claim in state court should exhaust his administrative remedies. prior to commencing suit. Having concluded that state courts may require exhaustion of state administrative remedies as a prerequisite to sec. 1983 cases brought in state court, we must determine whether we should require exhaustion in this case.

As we noted in *Nodell Investment Corp.*, the exhaustion rule is premised on the notion that an adequate administrative remedy is readily available on the party's initiative. In arguing that the court should not require him to exhaust his remedies, Kramer claims that three exceptions apply to this case. First, Kramer asserts that he should not be required to exhaust administrative remedies because his action essentially challenges the constitutionality of his available administrative remedies. Second, he argues that his action raises a substantial constitutional question. Third, he contends that pursuing the available administrative remedies would be futile.

In essence, Kramer's three claimed exceptions can be distilled into one argument. Kramer contends he should not be required to exhaust his administrative remedies because exhaustion would be futile due to alleged constitutional inadequacies in the available procedures. Believing that the University denied him due process in reassigning him, Kramer brought this action on the assumption that the available University review procedures were insufficient to remedy his alleged injuries.

[5]

As we noted in *State ex rel. First National Bank v. M & I Peoples Bank,* 82 Wis. 2d at 545, a party "must exhaust administrative remedies before seeking judicial review of allegedly unconstitutional administrative agency action if the action challenged can be remedied in the administrative agency." To escape the exhaustion requirement, therefore, Kramer basically must prove that the administrative body either cannot or will not afford him adequate relief. Absent evidence that the reviewing agency is inherently biased, or that the agency is unable or unwilling to hear the claim, or that the agency is delaying review unnecessarily, a plaintiff's naked assertion that available administrative remedies are inadequate is insufficient to negate the general rule requiring exhaustion of administrative remedies. *See Castelaz,* 94 Wis. 2d at 535.

When Kramer filed suit in this case, adequate administrative remedies were readily available to him. The Executive Committee had the power to review the circumstances surrounding the

Chairman's decision to reassign Kramer, and the Chancellor had the authority to review the Executive Committee's decision. If the matter was not resolved at the institutional level, the Board of Regents had authority to review the Chancellor's decision. The University, therefore, afforded Kramer administrative procedures through which his alleged injury could be remedied.

[6]

Nonetheless, Kramer filed suit prior to exhausting these available administrative remedies. Further, when Kramer filed suit, he failed to prove that the available administrative remedies were inadequate. He offered no proof that the University was delaying review of the reassignment, was unable or unwilling to review the reassignment, or was biased in some way. We hold that none of the exceptions to the exhaustion doctrine are applicable to these facts. Kramer had an adequate administrative remedy readily available to him on his initiative. Before commencing this lawsuit, Kramer should have given the University an opportunity to correct the alleged injustices. Accordingly, we reverse the decision of the court of appeals and remand to the circuit court with instructions to dismiss.

By the Court.—The decision of the court of appeals is reversed.

Justice ABRAHAMSON, Shirley S. took no part.

Paul KRAMER, Plaintiff-Respondent
and Cross-Appellant,

v.

Frank E. HORTON, Chancellor of the
University of Wisconsin-Milwaukee,
Robert W. Corrigan, Dean of the School
of Fine Arts of the University of Wisconsin-
Milwaukee, and Gerald T. McKenna, Chairman
of the Department of Music of the University
of Wisconsin-Milwaukee, Defendants-Appellants
and Cross-Respondents.†

Court of Appeals

No. 84-762. Submitted on briefs February 1, 1985.—
Decided May 6, 1985.
(Also reported in 371 N.W.2d 801.)

1. **Pleadings § 227*—motion to dismiss complaint—construction.**

   In ruling on motion to dismiss, complaint should be liberally construed and is entitled to all reasonable inferences necessary to achieve substantial justice and should not be dismissed unless it appears with certainty that plaintiff is not entitled to relief under facts alleged.

2. **Constitutional Law § 274*—deprivation of constitutional rights—cause of action—elements.**

   In order for complaint to state cause of action under § 1983, plaintiff must prove that plaintiff was deprived of right secured by constitution or laws of United States and that actions of defendant were taken under color of state law.

3. **Constitutional Law § 277*—deprivation of constitutional rights—cause of action—position as university musician—sufficiency of complaint.**

†Petition to review granted.

Plaintiff's complaint was sufficient to state claim under § 1983 where complaint alleged that he was dismissed from his position as oboist in university quintet as result of various meetings held by his superiors at university and other members of quintet and alleged that dismissal substantially harmed his professional reputation and seriously jeopardized his career as performer and educator.

4. **Officers and Public Employees § 99*—actions against employees—notice of claim—necessity of filing.**

   Plaintiff's failure to allege compliance with statute requiring written notice of claim to be served upon attorney general within 90 days of event causing damage due to act committed by state employee in course of his or her duties did not bar his claim for relief under federal statute, since to accept such position would elevate subtleties of state procedural law above avenue of relief created by Congress for protection of federal constitutional rights from deprivations by persons acting with state authority.

5. **Administrative Law § 54*—exhaustion of remedies—civil rights claim—defense.**

   Exhaustion of administrative remedies is not mandatory before claim based on federal civil rights statute may be filed where claims are based on alleged constitutional inadequacy of administrative procedures available.

6. **Judgments § 112*—summary judgments—denial—propriety.**

   In action against university alleging that administrative remedies available to contest termination of employee were constitutionally inadequate, denial of summary judgment was proper because defendant university failed to establish that there were no factual issues and that it was entitled to judgment as matter of law.

7. **Judgments § 101*—summary judgments—granting—standard of review.**

Summary judgment may be granted only where there appears on record to be no genuine issue as to any material fact and moving party is entitled to judgment as matter of law.

8. **Judgments § 101.50*—summary judgments—genuine issue of material fact—existence.**

Doubts as to existence of genuine issue of material fact should be resolved against a party moving for summary judgment.

9. **Judgments § 113*—summary judgments—position of employment—liberty interest—existence of material issue of fact.**

Trial court properly denied summary judgment on issue of whether plaintiff demonstrated deprivation of his liberty interest in other employment activities cognizable under the due process clause where there was substantial question of material fact as to whether plaintiff's professional reputation and employability had been damaged, based on testimony and affidavits regarding rumors spreading throughout music community.

10. **Judgments § 113*—summary judgments—position as musician—constitutional entitlement—violation of property interest.**

Plaintiff, who was dismissed from position as oboist in university quintet, had claim of entitlement to that position and, therefore, his forced resignation by other members of quintet was property interest violation and, thus, their existent question of fact as to whether there was "implied" agreement between university and plaintiff.

11. **Judgments § 113*—summary judgments—position as musician—removal—due process opportunities—denial.**

Trial court properly denied motion for judgment on issue of whether plaintiff's due process rights were denied in his removal by other quintet members from his position as oboist at university where it was undisputed that plaintiff never received written specifications of why he was unacceptable and where he stated that he specifically asked other members why he was asked to resign but got no answer.

12. **Costs § 107*—attorneys fees—reasonable—determination.**

Determination of what is reasonable fee in action based upon federal civil rights statute is left to discretion of trial court.

13. **Costs § 107*—attorneys fees—specific award—reasonableness.**

Trial court's award of hourly rate of $40 to $65 was not so unreasonable to constitute misuse of discretion where it represented reasonable balance between compensation normally paid to counsel privately and that paid by government bodies for similar services and where trial court had opportunity to review affidavits containing time sheets submitted by plaintiff's counsel and response filed by defendant.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee county: HAROLD B. JACKSON, JR., Judge. *Affirmed and remanded.*

For the defendants-appellants and cross-respondents the cause was submitted on the briefs of *Bronson C. La Follette,* attorney general, with *Leroy L. Dalton,* assistant attorney general, of counsel, of Madison.

For the plaintiff-respondent and cross-appellant the cause was submitted on the briefs of *Meissner, Tierney, Ehlinger & Whipp, S.C.,* with *Dennis L. Fisher* and *Susan J. Marguet* of counsel, of Milwaukee.

Before Wedemeyer, P.J., Moser and Sullivan, JJ.

WEDEMEYER, P.J. Frank Horton, chancellor of the University of Wisconsin-Milwaukee, Robert Corrigan, dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, and Gerald McKenna, chairman of the Department of Music of the University of Wisconsin-Milwaukee, all in an official representative capacity (UWM), appeal from orders denying their motions for dismissal and for summary judgment. UWM also appeals from a judgment which ordered a "name-clearing" hearing for Paul Kramer, a tenured professor in the Department of Music, and awarded him $38,654.17 for attorney's fees, expenses and disbursements, under 42 U.S.C. sec. 1988.

Kramer cross-appeals from the judgment, arguing that he possessed a property interest in his position as oboist in the Woodwind Arts Quintet, a University organization, and that he was entitled to a hearing before he could be removed from the quintet. He also argues that the trial court applied an improper standard in awarding attorney's fees.

We hold as follows: (1) Because the pleadings sufficiently alleged the existence of a constitutionally protected liberty interest and the necessary elements of a civil rights claim under 42 U.S.C. sec. 1983, we affirm the trial court's order denying the motion to dismiss. (2) Because there were material issues of fact as to whether Kramer suffered impairment of liberty and property interests and whether he received sufficient notice to satisfy due process, we affirm the trial court's order denying the motion for summary judgment. (3) Because the trial court's findings of fact are not clearly erroneous and sufficient to support its conclusion of law that Kramer's liberty interest was violated, we affirm the judgment awarding Kramer a "name-clearing" hearing. (4) In regard to the cross-appeal, because the trial court did not misuse its discretion in setting the amount of attorney's fees, we affirm the award. (5) Because the trial court failed to address the questions whether Kramer had a property interest in his position in the quintet and whether that interest was violated, we remand the case to the trial court for further

proceedings to determine appropriate findings of fact and conclusions of law.

The following facts are undisputed: The University of Wisconsin-Milwaukee is an educational institution within the University of Wisconsin system, created and existing under art. X, sec. 6 of the Wisconsin Constitution and ch. 36, Stats., and as such is a branch of the State of Wisconsin. The university is organized into colleges, schools and departments, each with its own faculty. The School of Fine Arts is one of the schools of the university, and the Department of Music is a part of the School of Fine Arts. Paul Kramer is a tenured professor of music in the Department of Music.

Kramer graduated from the New England Conservatory of Music in 1964. He received a master's degree from Boston University in 1966. His area of concentration is applied music, performing as an oboist.

Kramer began his concert career in 1941, as a high school student, by substituting with the Cleveland Symphony Orchestra. From 1943 to 1945, he played with the United States Army Grand Forces Band. While attending college, he played as a substitute oboist with the Boston Symphony. From 1946 until 1966 he played with the same symphony and, at other times during the same period, with the Boston Pops and Esplanade Orchestras. He also performed with the American Ballet Theatre Orchestra, Leopold Stokowski's American Symphony Orchestra, the Baltimore Symphony, and the Pittsburgh Symphony.

In early 1966, Kramer auditioned for a position at the university and, on July 5, 1966, he accepted an appointment offered by Dean A.A. Suppan as assistant professor of music. The appointment letter stated: "In addition to teaching general and applied music, your services to the university will include performing."

At the behest of Dean Suppan, Kramer helped to organize the Woodwind Arts Quintet and to recruit its members. All of the individuals who were recruited for this teaching-performing role

were outstanding professional musicians. By October 12, 1970, the formation of an all-faculty woodwind quintet was complete. Commencing in 1971, the quintet members were given formal release time from their teaching responsibilities in order to rehearse and perform. From time to time members left the quintet for various reasons and were replaced. Kramer helped recruit the new members.

Kramer received tenure and became an associate professor in 1971. In 1975, he was promoted to the position of full professor in the music department. He was an artist of national repute and was characterized as the "anchorman" of the Woodwind Arts Quintet.

Full-time music department faculty members usually received nine-month appointments for the academic year. Separate appointments, full or part-time, were made for the summer session. Kramer was a member of the quintet both during the school year and during the summer sessions from 1971 until September, 1979.

It was the custom of the members of the quintet to evaluate one another's performance as circumstances required. Although quintet members criticized Kramer's performance on several occasions between November, 1977, and July, 1979, at no time prior to July, 1979, did any member of the quintet tell Kramer that his performance must improve or the other members would try to remove him.

On July 20, 1979, the other members of the quintet asked Kramer to attend a meeting to be held July 21. At that meeting, the other members asked him to resign. They proffered no written statement of the reasons for their action. Kramer refused their request.

Kramer protested his removal from the quintet to the chairman of the music department, Emanuel Rubin, and to the dean of the School of Fine Arts, Robert Corrigan, but to no avail. Rubin removed him from the quintet and gave him added teaching responsibilities instead.

Kramer wrote to the university's Faculty Executive Committee, also known as the University Committee, requesting that his removal from the quintet be reconsidered. On September 29, 1979, the University Committee replied that his request ought to be directed to the executive committee of the music department. On the same date, the chairman of the University Committee also wrote to the chairman of the music department suggesting the desirability of establishing written rules for the hiring and dismissal of any person from the Woodwind Arts Quintet.

Kramer commenced this lawsuit on September 4, 1979, the first day of the 1979-80 academic year.

Kramer appealed his dismissal to the excutive committee of the music department of September 7, 1979. On September 11, the executive committee met to consider what procedures were to be used to review Kramer's reassignment from the quintet to teaching. Certain procedural rules were adopted.

On September 18, 1979, the executive committee of the music department convened a special meeting to review the decision to reassign Kramer from the quintet to additional teaching. Kramer was given no written statement specifying the reasons for his reassignment prior to or at this meeting. He was not allowed to call witnesses. Although his counsel was present, counsel was not permitted to introduce evidence or cross-examine the speakers.

On September 26, the executive committee issued a written report affirming that Dr. Rubin had acted within the jurisdiction of his office in reassigning Kramer to full-time teaching duties and stated that an adequate basis existed for the decision and that it was in the best interests of the department.

In March, 1980, Kramer appealed the executive committee's decision to the chancellor on both procedural and substantive grounds. The appeal was denied. Kramer has exhausted all available procedures for administrative review.

MOTION TO DISMISS

Sufficiency of Allegations

[1]

UWM first argues that Kramer's amended complaint fails to state a claim on which relief can be granted because the "liberty interest" allegation is insufficient. On a motion to dismiss, only the allegations of the complaint are tested. Whether the facts pleaded can be proved or whether a defense may be pleaded and proved that may vitiate the complaint are questions not before the court. *Riedy v. Sperry,* 83 Wis. 2d 158, 165, 265 N.W.2d 475, 479 (1978). In a ruling on a motion to dismiss, the complaint should be liberally construed and is entitled to all reasonable inferences necessary to achieve substantial justice. It should not be dismissed unless it appears with certainty that the plaintiff is not entitled to relief under the facts alleged. *Id.* at 166, 265 N.W.2d at 479-80.

[2, 3]

Under 42 U.S.C. sec. 1983, only two elements are required to state a claim: (1) the plaintiff must have been deprived of a right secured by the constitution or laws of the United States; and (2) the actions of the defendant must have been taken under color of state law. *Id.* at 163, 265 N.W.2d at 478. Kramer's complaint alleges he was dismissed from his position as the oboist in the quintet as a result of the various meetings held by his superiors at the university and the other members of the quintet. Kramer further alleges that the dismissal substantially harmed his professional reputation and seriously jeopardized his career as a performer and educator. We conclude that Kramer has stated a claim under sec. 1983.

Notice of Claim Statute

UWM next argues that the complaint and amended complaint fail to state claims upon which relief can be granted because they do not allege compliance with sec. 895.45, Stats. (1977), the

"notice of claim" statute.[1] This statute prohibits the commencement of an action against a state employee for any act committed by the employee in the course of his or her duties, unless a written notice of claim is first served on the attorney general within ninety days of the event causing the alleged damages.

In *Perrote v. Percy,* 452 F. Supp. 604 (E.D. Wis. 1978), the federal district court examined the same defense to a sec. 1983 claim as UWM now raises. In resolving the issue in favor of the plaintiff, the court observed: "Acceptance of the defendants' position would unacceptably elevate subtleties of state procedural law above the avenue of relief created by Congress for the protection of federal constitutional rights from deprivations by persons acting with state authority." *Id* at 605. *See also Doe v. Ellis,* 103 Wis. 2d 581, 587-88, 309 N.W.2d 375, 377 (Ct. App. 1981).

[4]

We find this reasoning most compelling. We hold that Kramer's failure to allege compliance with sec. 895.45, Stats. (1977), does not bar his claim for relief.

Exhaustion of Administrative Remedies

UWM next contends that the complaint fails to state a claim on which relief can be granted because it shows that Kramer did

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[1]Section 895.5, Stats. (1977), was in effect when Kramer was removed from the quintet. It provided in part:

(1) No civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of such officer's, employe's or agent's duties, unless within 90 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved.

Section 895.45 was renumbered as sec. 893.82 by sec. 30, ch. 323, Laws of 1979.

not exhaust his administrative remedies before filing suit. The basis for this contention is that the complaint, on its face, demonstrates that Kramer had previously commenced administrative action at the time he filed these claims. UWM cites *Castelaz v. City of Milwaukee,* 94 Wis. 2d 513, 289 N.W.2d 259 (1980), for the proposition that when there is provided an adequate administrative remedy, including court review of the administrative decision, exhaustion of administrative remedies is required before a sec. 1983 claim may be filed. We disagree.

First, UWM's reliance on *Castelaz* is misplaced. In addressing the same issue which we are examining, the supreme court declared:

> The doctrine of exhaustion is a discretionary rather than a constitutional rule in § 1983 cases. There has been no allegation in this case that the civil service procedures available . . . were inadequate . . . We believe that the no-exhaustion rule as applied to § 1983 claims brought in state courts is not to be "woodenly" applied. We therefore follow the decisions of a number of the federal circuit courts of appeal which have held that, depending on the case, exhaustion of state administrative remedies *may* be required. [Emphasis added, footnote omitted.]

Id. at 534-35, 289 N.W.2d at 269.

[5]

It is evident from this statement that exhaustion of adminis trative remedies is not mandatory. Here, in contrast to the situation in *Castelaz,* Kramer's claims are based on the alleged constitutional inadequacy of the administrative procedures available. The supreme court recognized in *Castelaz,* albeit impliedly, that in this type of case exhaustion was not required. *Id.* at 535, 289 N.W.2d at 269. *See also Barry v. Barchi,* 443 U.S. 55, 63 n. 10 (1979); *Gibson v. Berryhill,* 411 U.S. 564, 574-75 (1973).

We further note that in *Patsy v. Board of Regents,* 457 U.S. 496, 516 (1982), the Supreme Court, after a thorough examination of sec. 1983's legislative history, concluded that exhaustion of state administrative remedies ought not be required as a pre-

requisite to bringing an action in federal court pursuant to sec. 1983. The order denying UWM's motion to dismiss is affirmed.

SUMMARY JUDGMENT

[6]

UWM contends that the trial court erred in denying its motion for summary judgment. The trial court denied the motion without explication. We hold that because UWM failed to establish that there were no factual issues and that it was entitled to judgment as a matter of law, denial of summary judgment was proper.

[7, 8]

In reviewing a trial court's denial of a motion for summary judgment, we proceed in the same manner as the trial court by applying the standards set forth in sec. 802.08(2), Stats. Summary judgment may be granted only when there appears on the record to be no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Wright v. Hasley,* 86 Wis. 2d 572, 579, 273 N.W.2d 319, 322-23 (1979). A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. When the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, summary judgment is improper. *Grams v. Boss,* 97 Wis. 2d 332, 338-39, 294 N.W.2d 473, 477 (1980).

UWM argues that the undisputed facts available to the court at the time the motion for summary judgment was considered established that there were no liberty or property interest violations and that if due process was required, it was granted. We shall examine each aspect of UWM's argument separately.

Liberty Interest

In order to withstand the summary judgment motion, Kramer had to demonstrate a deprivation of his liberty interest

cognizable under the due process clause. The Supreme Court in *Board of Regents v. Roth,* 408 U.S. 564, 573-74 (1972), set forth the governing principles for an examination of this sort:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. . . . Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." In such a case, due process would accord an opportunity to refute the charge before University officials.[12] . . .
>
> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities . . . . Had it done so, this, again, would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . . ." [Citations omitted.]

[12] The purpose of such notice and hearing is to provide the person an opportunity to clear his name. . . .

UWM contends that there was no factual issue relating to whether the action of its officials in removing Kramer from the quintet and reassigning him to other professorial duties damaged his professional reputation and employability as a performing musician. It argues, first, that Kramer submitted no evidence that UWM published Kramer's removal from the quintet. We disagree. As this and later sections of the opinion will demonstrate, it is clear that the many tongues of rumor ran rampant in the music community.

The dean of the fine arts department, Robert Corrigan, testified in his deposition that the music community is fairly close-knit and that rumors tend to spread rapidly within it. As early as the summer of 1977, he began to hear negative comments about Kramer's performing ability. In late 1977 or early

1978, the members of the quintet came to see him about the problem they were having with Kramer. Corrigan also remembered discussing the matter with Emanuel Rubin, the chairperson of the music department, because Rubin brought the matter to his attention.

In June, 1979, Corrigan again met with the members of the quintet, who reiterated their criticism of Kramer's performance and his ability to work in a chamber music setting. Corrigan discussed the problem with Rubin. He believed that the members of the quintet had also discussed the problem with Rubin. At that time, however, they had not proposed their resolution of the problem to Kramer. Corrigan knew that the members of the quintet had "identified" someone to replace Kramer.

Rubin testified in his deposition that he was aware during the summer of 1979 that the quintet was searching for a replacement oboist. This all occurred before Kramer was asked to accept reassignment. In late summer Rubin and Corrigan again discussed the entire matter before reassigning Kramer. A replacement oboist was hired in September for the 1979-80 academic year. We conclude that whether UWM officials directly participated or knowingly acquiesced in the dissemination of information relating to Kramer's reassignment and the reasons therefor, before Kramer himself was informed, required a determination of fact.

UWM next contends that the undisputed facts were insufficient to show that Kramer's professional reputation or future employability was damaged. In *Churchwell v. United States,* 545 F.2d 59 (8th Cir. 1976), a probationary registered nurse was not rehired because her conduct on the job and irregularities in inventorying drugs had not met required performance standards. The court affirmed a partial summary judgment for the plaintiff and ordered a pretermination hearing. It stated:

> [E]very dismissal from state or government employment does not implicate an interest in liberty. . . . "[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an oppor-

tunity to be heard are essential." . . . [W]here the state "imposed . . . a stigma or other disability that foreclosed . . . freedom to take advantage of other employment opportunities" the safeguards of notice and hearing are required. [Citations omitted.]

Id. at 62.

We do not deem it unreasonable to conclude that a person's interest in other employment opportunities can be impaired where his superiors participate in recruiting efforts to replace him without affording him an opportunity to rebut the allegation. The dissemination of charges might seriously impair Kramer's standing in the community of professional musicians and would be likely to interfere with his later efforts to obtain employment. *Cf. Casey v. Roudebush,* 395 F. Supp. 60, 63 (D. Md. 1975).

UWM may not have directly publicized what was generally supposed in the music community to be the reasons for Kramer's removal from the quintet. It did, however, damage Kramer by, in effect, giving currency to the rumors in the community that he lacked the necessary musical qualities to discharge his responsibility. This resulted from failing to provide him an opportunity to rebut what it should have known were the community-believed reasons for his removal. "A due process hearing . . . minimally provides the employee an opportunity to establish that, even if he is to be dismissed, his dismissal follows from legitimate reasons and not the stigmatic ones generally supposed." *An-Ti Chai v. Michigan Technological University,* 493 F. Supp. 1137, 1157 (W.D. Mich. 1980) (footnote omitted).

[9]

We hold that on the record before the trial court on the motion for summary judgment, there was a substantial question of material fact whether Kramer's professional reputation and employability had been damaged. Kramer has minimally demonstrated a deprivation of his liberty interest cognizable under the due process clause. The trial court properly denied summary judgment on this issue.

Property Interest

[10]

In response to Kramer's claim of a property interest impairment, UWM argues that the undisputed facts demonstrate neither an express contract or an implied-in-fact contract recognizable under Wisconsin law. UWM argues that Kramer had no claim of entitlement to the position of oboist in the quintet and that therefore there could be no property interest violation. We are not convinced.

In *Perry v. Sindermann,* 408 U.S. 593, 601 (1972), the Supreme Court declared: "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." It further stated that the absence of an explicit contractual provision may not always foreclose the possibility that an employee has a property interest. *Id.* "[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth,* 408 U.S. at 577.

"[T]he law of contracts in most . . . jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.'" *Perry,* 408 U.S. at 601-02 (citing 3 *Corbin on Contracts* secs. 561-572A (1960)). "The essence of an implied in fact contract is that it arises from an agreement circumstantially proved." *Theuerkauf v. Sutton,* 102 Wis. 2d 176, 184, 306 N.W.2d 651, 657 (1981).

"'[A]lthough the primary source of property rights is state law, the state may not magically declare an interest to be *"non* property" after the fact for Fourteenth Amendment purposes if, for example, a longstanding pattern of practice has established an individual's entitlement to a particular governmental benefit.'" *Winkler v. County of DeKalb,* 648 F.2d 411, 414 (5th Cir. 1981) (citation omitted) (emphasis in original).

The depositions reviewed by the trial court for the purposes of summary judgment show that Kramer intended, when he was hired, to continue performing as a professional oboist. Communications took place between himself and Dean Suppan relating to the formation of a faculty woodwind group and his role in helping to organize it. Although his contract did not specify how he was to "perform," all the professors he assisted in recruiting were given contracts expressly stating their dual role as a teacher and member of the Woodwind Arts Quintet. As a tenured professor from 1971 to 1979, Kramer's dual role was essentially the same as that of the other members of the quintet. Given this evidence of a pattern of practice, we hold that the question of whether there existed mutual understandings or implied agreements, with their accompanying justifiable expectations equivalent to entitlement, is very much in dispute and presents a material issue of fact. Thus the trial court was correct in denying the summary judgment on this issue.

Satisfactory Notice and Hearing for Due Process Purposes

UWM next contends that even if Kramer ought not to have been removed from the quintet without due process, the notice and hearing he received afforded him all the process he was due. It argues that the decision to remove him was careful and deliberate. It further argues that he was fully apprised of the other quintet members' dissatisfaction with his performance at least as early as July 21, 1979.

It is undisputed that Kramer never received written specifications of why he was unacceptable to the other members of the quintet. Kramer stated in his deposition that he never received any statement of why he was asked to resign from the quintet. He stated that at one time he specifically asked the other quintet members why, but got no answer. A factual dispute thus existed as to whether Kramer had notice of the reasons for his removal.

UWM argues that Kramer received whatever process was due him at the hearing held before the executive committee of the music department. On September 18, 1979, after Kramer's removal, the executive committee convened to consider his petition to review the removal. The committee expressed displeasure

with the procedure that had been used, but nevertheless found no denial of Kramer's rights and chose not to reverse Rubin's action in removing and reassigning Kramer.

[11]

There is no question that Kramer never received a pretermination hearing relating to his removal and reassignment. Kramer claims he never was afforded an opportunity to address the merits of his removal and reassignment. All that he was allowed to address at the September 18, 1979 meeting was the fairness of the procedure employed. This does not rise to the level of "an opportunity to respond" to the charges against him, identified by the Supreme Court as one of "[t]he essential requirements of due process." *See Board of Education v. Loudermill,* 53 U.S.L.W. 4306, 4309 (U.S. Mar. 19, 1985), *aff'g* 721 F.2d 550 (6th Cir. 1983).

In summary, Kramer established that factual issues existed regarding whether UWM published any information about his removal from the quintet, whether Kramer's professional reputation and future employability were damaged, whether facts and circumstances existed which would have created a legitimate expectation of future employment, and what sort of notice Kramer received as to the reasons for his reassignment. Further, the hearing Kramer received did not meet minimum due process standards. The trial court did not err by denying UWM's motion for summary judgment.

NAME-CLEARING HEARING

This case involves due process, not artistic proficiency or acceptance by one's peers. The trial court concluded that Kramer possessed "a liberty interest in not being forcibly removed from the Quintet under circumstances which severely impugn his professional reputation and employability in a similar position." To support this conclusion, it found that UWM's actions in removing Kramer diminished his reputation in the university music community and his employability as a performing chamber musician. UWM attacks the trial court's findings that Kramer's professional reputation and future employability were damaged.

We shall not reverse a finding made by the trial court unless it is clearly erroneous. *Noll v. Dimiceli's, Inc.,* 115 Wis. 2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983); sec. 805.17(2), Stats. The test is not whether the evidence in support of the trial court's finding constitutes the great weight and clear preponderance of the evidence, but whether the evidence in support of a contrary finding constitutes the great weight and clear preponderance of the evidence. The trial court is the ultimate arbiter of the credibility of the witnesses, and when more than one reasonable inference can be drawn from the credible evidence, this court must accept the inference drawn by the trier of fact. *Noll,* 115 Wis. 2d at 643-44, 340 N.W.2d at 577.

The trial court considered the testimony of ten witnesses. Five of the witnesses offered observations or opinions as to the effect that Kramer's removal from the quintet had on his reputation.

Kramer himself learned that after the dismissal, other people began to question his professional abilities and capacity. Monte Perkins, a longtime performing basoonist and music teacher in the Milwaukee area, said that Kramer's dismissal was a topic of conversation in the music community. He said Kramer's removal "probably" caused a diminution of his reputation with the community. "It cast question on his ability as a performer and teacher, . . . in that if someone in their profession is not performing well . . . then you have the question, whether they would have the ability to teach someone else to do it."

Glenn Bowen, a University of Wisconsin-Madison music professor and the clarinetist in the Wingra Woodwind Quintet, testified that the rumors attending Kramer's dismissal damaged Kramer's reputation as a professional chamber musician. Allen Sapp, a professor of composition at the University of Cincinnati's conservatory of music, who has a broad administrative background in university musical departments, opined that a summary dismissal from a performing group would impact immediately on a musician's employment desirability. Even Robert Goodberg, one of the members of the quintet who sought Kramer's removal, concurred that the action had a detrimental effect on Kramer's reputation.

This testimony provides ample support for the trial court's findings of fact. The findings are not clearly erroneous and we shall leave them undisturbed.

PROPERTY INTEREST

Kramer contends on cross-appeal that he possessed a property interest in his position as oboist in the quintet. He argues that the relationship existing between himself and the university was the equivalent of dual capacity employment in which he held an expectancy. He argues that his removal from the quintet and reassignment to teaching was a *de facto* demotion without a showing of cause, for which he was entitled a due process hearing.

The trial court's decision did not address the question of whether Kramer possessed a property interest in the oboist position. This case was tried to the trial court. The court had an opportunity to view the witnesses, assess their credibility, and determine the probative value of their testimony. A mere reading of a record can never place this court in the same advantageous position as the trial court. Because of the significance of this issue, we remand the case to the trial court for appropriate findings of fact and conclusions of law.[2]

ATTORNEY'S FEES

Kramer's second issue on cross-appeal relates to the award of $37,015 for attorney's fees, pursuant to 42 U.S.C. sec. 1988. The trial court set hourly rates for Kramer's counsel at $40-$65. Kramer contends that the trial court erred in setting that rate by considering the fees paid to attorneys under S.C.R. 81.02(1), $50 per hour for court time and $35 per hour for office time, and the fees paid for legal work contracted by the state, $50 to $60 per hour. Kramer's counsel requested rates ranging from $85 per hour for the lead trial counsel, to $65 per hour for associate lawyers who assisted. The trial court stated that

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[2]We call the trial court's attention to the recently decided case of *Board of Education v. Loudermill,* 53 U.S.L.W. 4306 (U.S. Mar. 19, 1985), *aff'g* 721 F.2d 550 (6th Cir. 1983), for possible assistance.

$40-$65 represented a "reasonable balance" between the compensation normally paid by private clients and the compensation paid by governmental bodies.

[12]

The determination of what is a reasonable fee under sec. 1988 is left to the discretion of the trial court. Absent a misuse of discretion, the trial court's award will not be reversed. *Thompson v. Village of Hales Corners,* 115 Wis. 2d 289, 305, 340 N.W.2d 704, 712, (1983). We will not find a misuse of discretion unless discretion was not exercised or there was no reasonable basis for the trial court's decision. *Wisconsin Public Service Corp. v. Krist,* 104 Wis. 2d 381, 395, 311 N.W.2d 624, 631 (1981).

Here the trial court had the opportunity to review the affidavits containing the time sheets submitted by Kramer's counsel and the response filed by UWM. It considered the alternative proposals and then, acting on this information and the quality of representation given Kramer, determined that the hourly rate of $40 to $65 represented a reasonable "balance" between the compensation normally paid to counsel privately and that paid by government bodies for similar services.

[13]

Although every case must be evaluated on its own facts and circumstances, and rates vary among lawyers and among communities and as between partners and associates and lead lawyers and assistants, we cannot say that the trial court's determination was so unreasonable as to constitute a misuse of discretion. We therefore affirm.

By the Court—Judgment affirmed and cause remanded for proceedings consistent with this opinion.

THE UNIVERSITY OF WISCONSIN—MILWAUKEE/P. O. Box 413, Milwaukee, Wisconsin 53201

THE UNIVERSITY COMMITTEE
MITCHELL HALL 233E
PHONE: (414) 963-4120

August 29, 1979

Professor Paul Kramer
Department of Music
Univ. of Wisconsin-Milwaukee

Dear Paul:

The University Committee has taken up your recent letter. Since the major part of your grievance includes questions of an assignment to the Woodwind Arts Quintet and to teaching duties, we believe that you should appeal to the Executive Committee of the Department of Music, for by tradition on our campus it has jurisdiction over teaching duties.

In regard to your complaint about the merit salary increase which you received, I would suggest that if you wish to appeal the decision on your salary increase, you should write a separate note to Professor Marilyn Miller. I am confident that she will be happy to refer it to the Faculty Merit Appeals Committee.

Please contact me or Professor Miller if you have any questions.

Sincerely,

/s/

Leon M. Schur
Chairman, University Committee

LMS:jc

cc: Prof. Emanuel Rubin
Dean Robert Corrigan

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

PAUL KRAMER,

Plaintiff,

v. Case No. 499-335

LEON M. SCHUR, Acting Chancellor of the University of Wisconsin-Milwaukee,

ROBERT W. CORRIGAN, Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, and

EMANUEL RUBIN, Chairman of the Department of Music of the University of Wisconsin-Milwaukee,

Defendants.

NOTICE OF HEARING ON MOTION FOR ORDER DISMISSING ACTION

TO: Hoyt, Greene & Meissner, S.C.
Attorneys at Law
and
Ralph J. Ehlinger
Attorney at Law
and
Dennis L. Fisher
Attorney at Law
735 North Water Street
Milwaukee, Wisconsin 53202

Attorneys for Plaintiff

PLEASE TAKE NOTICE that a hearing will be held herein on the Motion for Order Dismissing Action filed in the above-captioned cause, a copy of which motion is annexed hereto, before the Honorable Harold B. Jackson, Jr., Circuit Judge, Circuit Court, Milwaukee County, Wisconsin, Circuit Judge presiding, in Room 404 of the Milwaukee County Courthouse, 901 North 9th Street, Milwaukee, Wisconsin, at 10:30 o'clock A.M., on October 5, 1979.

Dated this 18th day of September, 1979.

BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin

/s/

JAMES H. McDERMOTT
Assistant Attorney General

P.O. Address:
114 East, State Capitol
Madison, Wisconsin 53702

Attorneys for Defendants

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

PAUL KRAMER,

Plaintiff,

v. Case No. 499-335

LEON M. SCHUR, Acting Chancellor of the University of Wisconsin-Milwaukee,

ROBERT W. CORRIGAN, Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, and

EMANUEL RUBIN, Chairman of the Department of Music of the University of Wisconsin-Milwaukee,

Defendants.

MOTION FOR ORDER DISMISSING ACTION

Now come the defendants above-named, by Bronson C. La Follette, Attorney General, State of Wisconsin, and James H. McDermott, Assistant Attorney General, their attorneys, and hereby move this Court for an order dismissing this action on the following grounds:

(1) On the ground that the Complaint herein fails to state a claim on which relief can be granted, and/or on the ground that this Court lacks jurisdiction over the persons of the defendants, and/or on the ground that this Court lacks jurisdiction over the subject matter hereof, in that the said Complaint fails to allege compliance by the plaintiff with the requirement of sec. 895.45(1), Stats., for service of a notice of claim upon the Attorney General.

(2) On the ground that the Complaint herein fails to state a claim on which relief can be granted, in that, while stating the conclusion of law that the plaintiff "has a valuable property right in his position in the Quintet", the Complaint contains no allegation of underlying facts, if any, supporting such conclusion; and without such facts being alleged, the Complaint states no claim on which relief can be granted, it being essential to plaintiff's claim for injunctive relief herein, and/or to any other relief, that he allege facts which, if proven, will show him to have a property right in the position in the Quintet here involved.

(3) On the ground that the Complaint herein fails to state a claim on which relief can be granted, in that, on its face, it shows that the plaintiff has not exhausted his administrative remedies herein, before commencing this suit.

(4) Even if good reason existed for a court to assume jurisdiction over the matter here involved, notwithstanding plaintiff's failure to exhaust his administrative remedies, or even if the plaintiff had exhausted said remedies, on the ground that the Complaint herein fails to state a claim on which relief can be granted, in that the exclusive remedy for judicial review of the administrative decision here involved is that provided under secs. 227.15-227.20, Stats.

(5) On the ground that this Court lacks jurisdiction over the persons of the defendants, and/or on the ground that there is an insufficiency of summons or process herein, in that the summons herein filed and served fails to state the correct time within which the defendants are required to answer, said time being 45 days, pursuant to sec. 802.06(1), Stats.

Dated this 18th day of September, 1979.

BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin

/s/

JAMES H. McDERMOTT
Assistant Attorney General

Attorneys for Defendants

P.O. Address:
114 East, State Capitol
Madison, Wisconsin 53702

STATE OF WISCONSIN — CIRCUIT COURT
MILWAUKEE COUNTY

PAUL KRAMER,

Plaintiff,

v.

LEON M. SCHUR, Acting Chancellor of the University of Wisconsin-Milwaukee,

ROBERT W. CORRIGAN, Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, and

EMANUEL RUBIN, Chairman of the Department of Music of the University of Wisconsin-Milwaukee,

Defendants.

Amended Complaint
Case No. 499335

The above-named plaintiff, by his attorney, Hoyt, Greene & Meissner, S.C., as and for his Amended Complaint against the defendants, alleges that:

FIRST CAUSE OF ACTION

1. Plaintiff is a tenured professor of music in the Department of Music at the University of Wisconsin-Milwaukee ("UWM").

2. UWM is an institution within the University of Wisconsin System created by the State of Wisconsin under Chapter 36 of the Wisconsin Statutes and Article X, Section 6 of the Wisconsin Constitution and as such is a branch of the government of the State of Wisconsin.

3. Defendant Leon M. Schur is acting Chancellor of UWM and as such is the executive head of that institution and of its faculty and is responsible, *inter alia,* for "defining and administering institutional standards for faculty peer evaluation". (Wis. Stat. §36.09(3)). He resides at 173 West Suburban Drive, Fox Point, Wisconsin.

4. Defendant Robert W. Corrigan is the Dean and Chief Executive Officer of the UWM School of Fine Arts, of which the Department of Music is a part. He resides at 1037 Ogden Avenue, Milwaukee, Wisconsin.

5. Defendant Emanuel Rubin is the Chairman and Chief Executive Officer of the UWM Department of Music. He resides at 3539 North Maryland Avenue, Shorewood, Wisconsin.

6. Plaintiff accepted his faculty appointment at UWM in 1966 with an express understanding conveyed by the then Dean of the School of Fine Arts, Adolph Suppan, that a significant portion of his faculty responsibilities would involve formation of, and participation in, a faculty woodwind quintet. Plaintiff immediately pursued these responsibilities, and has been the oboist in the UWM Woodwind Arts Quintet continuously since its founding in 1966. Plaintiff was rewarded for his overall performance in the Department of Music by receiving tenure in 1971 and the rank of full professor in 1975.

7. The Department of Music has consistently reaffirmed plaintiff's position as oboist in the Quintet since 1966 and has on numerous occasions recruited and hired other faculty members whose responsibilities were specifically stated to include performing in the Quintet. By virtue of these and other actions by the various Chairmen of the Music Department and the Deans of the School of Fine Arts since 1966, an understanding and implied agreement has arisen between plaintiff and UWM that plaintiff would continue in his position as oboist in the Quintet absent a showing of cause for dismissal.

8. Prior to a meeting with the other members of the Quintet on July 21, 1979, plaintiff was given no notice of any

dissatisfaction with his performance as oboist nor was he notified of any proposal that he be removed from that position.

9. On or about July 24, 1979, plaintiff was advised by defendants Rubin and Corrigan that he had been dismissed from his position as oboist of the Quintet and was being reassigned to other duties. Plaintiff was told that the action was taken as a result of meeting between Rubin and Corrigan and the four other members of the Quintet at which the other members of the Quintet expressed complaints about Plaintiff's abilities to perform with the group. Plaintiff had not been informed of these meetings.

10. Plaintiff has a valuable property right in his position in the Quintet and must be afforded due process under the Wisconsin and federal Constitutions before that position can be taken away. Removal from the Quintet will also result in an annual loss of approximately $6,000, which would otherwise have been received from fees for Quintet concerts outside UWM and from a salary for a summer session appointment at UWM which had traditionally been awarded to Quintet members.

11. The loss of his Quintet position and his reassignment will do substantial irreparable harm to plaintiff's professional reputation and will seriously jeopardize his career as a performer and educator, thereby infringing upon his liberty interests protected by the due process clause of the federal Constitution.

12. Plaintiff was denied due process in that he was given no notice of the decision to dismiss and reassign him until after that decision had been made, was given no specific statement of the reasons for the action, and was afforded no opportunity for a hearing at which he could present a defense.

13. Due process requires that plaintiff be given a specific statement of the charges against him and a reasonable opportunity to prove to an impartial tribunal that those charges are false. Because of the unique nature of his duties as a performing member of the Quintet, if the reason for the proposed dismissal is artistic inadequacy, the only meaningful opportunity for

defense must consist of an evaluation of his performance by impartial music experts. Defendants Rubin and Corrigan and the other four members of the Quintet must be disqualified from participation in that evaluation because of the prejudicial personal bias they have demonstrated in passing judgment on plaintiff without affording him the barest elements of fair treatment and due process.

14. The actions of the defendants in dismissing plaintiff from his position as oboist in the UWM Woodwind Arts Quintet and reassigning him to other duties were taken under color of state law and deprived plaintiff of rights, privileges and immunities secured by the Fourteenth Amendment to the United States Constitution. Plaintiff is therefore entitled to equitable relief from the acts of the defendants under 42 U.S.C. §1983.

15. On August 6, 1979, plaintiff filed a grievance petition with the UWM University Committee. He supplemented that petition with a written addendum on August 24, 1979. On August 30 he received a letter dated August 29, 1979, from the Chairman of the University Committee advising advising him that that Committee had declined to act and had concluded that he should appeal to the Executive Committee of the Department of Music, "for by tradition on our campus it has jurisdiction over teaching duties". Plaintiff has diligently pursued all administrative remedies of which he has been apprised, but the defendants have failed, and continue to fail, to provide him with the procedural requisites mandated by the due process clause.

16. The dismissal and reassignment will become effective when the 1979-1980 academic year begins on September 4, 1979. If the defendants are not restrained from implementing their action before that time, the injury to plaintiff's reputation and career will become irreparable. Plaintiff has no adequate remedy at law.

SECOND CAUSE OF ACTION

17. Plaintiff realleges paragraphs 1 through 9 of his First Cause of Action with the same force and effect as if fully set forth herein.

18. Pursuant to Section UWS 6.01, Wis. Admin. Code, the faculty of UWM are required to establish rules and procedures to deal with allegations by the administration, academic staff or other faculty members "concerning conduct by a faculty member which . . . adversely affects the faculty member's performance of his/her obligation to the university but which allegations are not serious enough to warrant dismissal proceedings under UWS Chapter 4". Such rules are required to include a "guarantee of adequate due process to include, but not limited to, written notification of the complaint, fair and complete hearing procedures . . .".

19. Plaintiff's dismissal and reassignment was based upon complaints by other faculty members regarding the performance of his obligations to UWM, but he was given no statement of the complaints against him and no prior hearing was afforded to him. Upon information and belief the faculty of UWM have failed to promulgate the rules and procedures required by Section UWS 6.01, and if such rules and procedures have been adopted, the defendants failed to comply with such rules and procedures in making their decision to dismiss and reassign plaintiff.

WHEREFORE, plaintiff prays judgment as follows:

1. That a temporary injunction be issued, pending the trial of this action, restraining the defendants from dismissing the plaintiff from his position as oboist of the UWM Woodwind Arts Quintet and reassigning him to other duties;

2. That, if a temporary injunction does not issue, the defendants be mandatorily enjoined to reinstate plaintiff to his position as oboist in the UWM Woodwind Arts Quintet;

3. That the defendants be permanently enjoined from dismissing plaintiff from his position as oboist in the UWM Woodwind Arts Quintet and reassigning him to other duties until such time as the proper body of UWM, or this court, establishes adequate procedures to afford plaintiff due process in connection with his proposed dismissal, and until plaintiff has had a full opportunity to avail himself of these procedures;

4. That plaintiff be awarded reasonable attorneys' fees pursuant to 42 USC §1988; and

5. That plaintiff be awarded costs and disbursements and such other relief as the court may deem equitable and proper.

Dated this 29th day of October, 1979.

HOYT, GREENE & MEISSNER, S.C.

By /s/
Dennis L. Fisher
Attorneys for Plaintiff

735 North Water Street
Milwaukee, Wisconsin 53202
(414) 273-4390

STATE OF WISCONSIN — CIRCUIT COURT
MILWAUKEE — COUNTY

PAUL KRAMER,

Plaintiff,

v. — Case No. 499-335

LEON M. SCHUR, Acting Chancellor of the University of Wisconsin-Milwaukee,

ROBERT W. CORRIGAN, Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, and

EMANUEL RUBIN, Chairman of the Department of Music of the University of Wisconsin-Milwaukee,

Defendants.

NOTICE OF HEARING ON MOTION FOR ORDER DISMISSING ACTION

TO: Hoyt, Greene & Meissner, S.C.
Attorneys at Law
and
Ralph J. Ehlinger
Attorney at Law
and
Dennis L. Fisher
Attorney at Law
735 North Water Street
Milwaukee, Wisconsin 53202

Attorneys for Plaintiff

PLEASE TAKE NOTICE that a hearing will be held herein on the Motion for Order Dismissing Action of November 16, 1979, a copy of which motion is annexed hereto, before the Honorable Harold B. Jackson, Jr., Circuit Judge, Circuit Court, Milwaukee County, Wisconsin, Circuit Judge presiding, in Room 404 of the Milwaukee County Courthouse, 901 North 9th Street, Milwaukee, Wisconsin, at 2:00 p.m. on Monday, December 10, 1979.

Dated this 16th day of November, 1979.

BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin

/s/

JAMES H. McDERMOTT
Assistant Attorney General

Attorneys for Defendants

P.O. Address:
114 East, State Capitol
Madison, Wisconsin 53702

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

PAUL KRAMER,

Plaintiff,

v. Case No. 499-335

LEON M. SCHUR, Acting Chancellor of the University of Wisconsin-Milwaukee,

ROBERT W. CORRIGAN, Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, and

EMANUEL RUBIN, Chairman of the Department of Music of the University of Wisconsin-Milwaukee,

Defendants.

MOTION FOR ORDER DISMISSING ACTION

Now come the defendants above-named, by Bronson C. La Follette, Attorney General, State of Wisconsin and James H. McDermott, Assistant Attorney General, their attorneys, and, in response to the Amended Complaint herein filed and served, move the Court for an order dismissing this action on the following grounds:

A

GROUNDS FOR DISMISSAL OF THE FIRST AND SECOND CAUSES OF ACTION SET FORTH IN SAID AMENDED COMPLAINT

(1) On the ground that said first and second causes of action fail to state claims on which relief can be granted, in that they fail to allege that the plaintiff has exhausted his administrative remedies herein, before commencing this suit.

(2) On the ground that said causes of action fail to state claims on which relief can be granted, and/or on the ground that this Court lacks jurisdiction over the persons of the defendants, and/or on the ground that this Court lacks jurisdiction over the subject matter hereof, in that the said Amended Complaint fails to allege compliance by the plaintiff with the requirement of sec. 895.45(1), Stats., for service of a notice of claim upon the Attorney General.

B

SEPARATE GROUNDS FOR DISMISSAL OF THE FIRST CAUSE OF ACTION SET FORTH IN SAID AMENDED COMPLAINT

(1) On the ground that the said first cause of action, commingling an action for injunction with an action for equitable relief under 42 U.S.C. sec. 1983, fails to state a claim on which relief can be granted, whether such cause of action be construed as pleading an action for injunction as the "least allegation", or as pleading the said action under 42 U.S.C. sec. 1983 as the "least allegation", since said cause of action, construed in either way, fails to state a claim on which relief can be granted, in that it fails to allege that the plaintiff has exhausted his administrative remedies herein before commencing this suit.

(2) On the ground that said first cause of action, insofar as it attempts to state an action for injunction, and also insofar as it attempts to state an action under 42 U.S.S. sec. 1983, fails to state a claim upon which relief can be granted in that (a) while stating the conclusions of law that plaintiff "has a valuable property right in his position in the Quintet and must be afforded due process under the Wisconsin and federal Constitutions before that position can be taken away", the said first cause of action contains no allegation of underlying facts, if any there

are, supporting such conclusions; and (b) while referring to plaintiff's "liberty interests protected by the due process clause of the federal Constitution", the said first cause of action contains no allegation of underlying facts, if any there are, supporting the existence of said "liberty interests"; and (c) without such underlying facts being alleged, the said first cause of action states no claim on which relief can be granted, it being essential to plaintiff's claim for relief herein, whether by way of injunction or otherwise, that he allege facts which, if proven, will show him to have either a property interest in the position of the Quintet here involved, or a "liberty interest" involved in plaintiff's removal from the said position in the Quintet.

C

SEPARATE GROUNDS FOR DISMISSAL OF THE SECOND CAUSE OF ACTION SET FORTH IN THE SAID AMENDED COMPLAINT

(1) On the ground that the said second cause of action fails to state a claim on which relief can be granted, in that (a) it fails to set forth or claim any injury or damage sustained by the plaintiff; and (b) even if it could be viewed as setting forth or claiming such injury or damage, its allegation that "the faculty of UWM have failed to promulgate the rules and procedures required by sec. UWS 6.01", admitted by this motion as a fact well-pleaded, as so admitted precludes the granting of any relief against defendants in the second cause of action herein, since no one of them, nor all conjointly, is/are responsible for adoption of rules and procedures required by Wis. Adm. Code section UWS 6.01, or empowered to adopt such rules and procedures.

(2) On the ground, if said second cause of action be viewed as one attempting to allege a denial of due process to plaintiff, that it fails to state a claim on which relief can be granted in that it fails to allege that plaintiff has any property or liberty interest or interests entitled to the protection of due process.

Dated this 16th day of November, 1979.

BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin

/s/

JAMES H. McDERMOTT
Assistant Attorney General

Attorneys for Defendants

P.O. Address:
114 East, State Capitol
Madison, Wisconsin 53702

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

PAUL KRAMER,

Plaintiff,

v. Case No. 499-335

LEON M. SCHUR, Acting Chancellor of the University of Wisconsin-Milwaukee,

ROBERT W. CORRIGAN, Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, and

EMANUEL RUBIN, Chairman of the Department of Music of the University of Wisconsin-Milwaukee,

Defendants.

ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANTS

Now come the above-named defendants, each having been duly sworn, and in response to the above described interrogatories of the plaintiff, numbered 1 to 4, inclusive, set forth herein-below, jointly make the following answers thereto.

Q-1. State the name, address, age and official position or capacity of the persons answering these interrogatories.

A-1. (a) **Leon M. Schur**
Home Address:
173 West Suburban Drive
Fox Point, Wisconsin 53217

Business Address:
Chapman Hall
University of Wisconsin-Milwaukee
P.O. Box 413
Room 202
Milwaukee, Wisconsin 53201

Age: 57

Official Position:
Acting Chancellor of the University of Wisconsin-Milwaukee

(b) **Robert W. Corrigan**

Home Address:
1037 East Ogden Avenue
Milwaukee, Wisconsin 53202

Business Address:
Fine Arts Center
University of Wisconsin-Milwaukee
P.O. Box 413
Room A278
Milwaukee, Wisconsin 53201

Age: 52

Official Position:
Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee

(c) **Emanuel Rubin**

Home Address:
3539 North Maryland Avenue
Milwaukee, Wisconsin 53211

Business Address:
Fine Arts Center
University of Wisconsin-Milwaukee

P.O. Box 413
Room 120A
Milwaukee, Wisconsin 53201

Age: 44

Official Position:
Chairman of the Department of Music of the University of Wisconsin-Milwaukee

Q-2. Do you contend that the plaintiff has administrative procedures (within or without the University of Wisconsin-Milwaukee) available to him in which he could substantially obtain the relief sought in this action?

A-2. Yes, if administrative reinstatement of plaintiff to the position of oboist in the University of Wisconsin-Milwaukee Woodwind Arts Quintet, should it be directed, be viewed as substantially obtaining the relief herein sought.

Q-3. If your answer to the preceding interrogatory is "yes," then state the following with respect to each such administrative procedure which you contend is available:

(a) The nature of the available procedure (i.e., review hearing, grievance petition, etc.)

A-3. (a):

(1) Step I: Reference of plaintiff's grievance petition or complaint as to grievance for hearing.

(2) Step II: Hearing of such grievance.

(3) Step III: Review of recommendation resulting from such grievance hearing.

Q-3. (b) The name and position of the person or entity before whom the procedure is instituted and by whom it is implemented.

A-3. (b):

(1) As to Step I above-described: University Committee, University of Wisconsin-Milwaukee.

(2) As to Step II above-described: Departmental Executive Committee, Department of Music, University of Wisconsin-Milwaukee.

(3) As to Step III above described: Acting Chancellor Leon M. Schur, University of Wisconsin-Milwaukee.

Q-3. (c) The powers and authority of the person or entity identified in (b) (when acting in such capacity) with respect to granting plaintiff the relief requested in this action.

A-3. (c):

(1) As to the said University Committee, acting with reference to the plaintiff's grievance petition or complaint as to grievance, none, such Committee having only the power to refer the grievance to the said Departmental Executive Committee for hearing.

(2) As to the said Departmental Executive Committee, in its hearing of plaintiff's grievance, none, as it has only the power, having conducted such hearing, to recommend affirmance of the administrative action involved in such grievance, or its setting aside.

(3) As to the said Acting Chancellor, Leon M. Schur, conducting the review constituting Step III above-described, he has the power, upon such review, to direct administrative reinstatement of the plaintiff to the position of oboist in the University of Wisconsin-Milwaukee Woodwind Arts Quintet, which would be equivalent to the judicial reinstatement of plaintiff to such position, by mandatory injunction, sought by plaintiff in Par. (2) of the prayer of his Amended Complaint herein.

Q-3. (d) The actions which plaintiff must take to institute the procedure.

A-3. (d):

(1) As to the said Step I, submission of plaintiff's grievance petition or complaint as to grievance to the said University Committee.

(2) As to the said Step II, plaintiff need take no action to institute the hearing there involved, the same being instituted by

reference of plaintiff's above-described petition or complaint to the said Departmental Executive Committee by the said University Committee.

(3) As to the said Step III, plaintiff, in order to institute the review procedure there involved, should request the said Acting Chancellor, as executive head of the University of Wisconsin-Milwaukee, to review the decision reached in Step II, and to order plaintiff's reinstatement to the position of oboist in question.

Q-3. (e) Identify all documents which create, describe, limit or otherwise discuss in any manner the procedure. For each document identified, state the pages or section numbers of the document which specifically relate to the procedure.

A-3. (e):

(1) As to the said Step I, the above-described documents are these: (a) University of Wisconsin-Milwaukee Policies and Procedures, Supplement to Chapter 6, and specifically A 3.2-2(j), pp. 73, 74; and letter of August 29, 1979, from Leon M. Schur, Chairman, University Committee to plaintiff, and, specifically, the first paragraph thereof.

(2) As to the said Step II, there is one of the above-described documents, namely, Chapter UWS 6, Wisconsin Administrative Code, and specifically UWS 6.02, entitled "Grievances."

(3) As to the said Step III, there is no document of the kind described in Q-3 (e).

Q-3. (f) If you will do so without further discovery proceedings, attach a copy of each document identified in part (e) of your answer.

A-3. (f) In response to (f) above-stated, there is attached hereto a copy of each document identified in part (e) of our answer above-stated.

Q-4. State whether or not the result of each procedure set forth in response to Interrogatory Number 3 is subject to further

administrative procedures. If your answer is "yes," then set forth the information requested in Interrogatory Number 3, subparts (a)-(f), inclusive, for each such further administrative procedure.

A-4. In view of the answers set forth above to Q-3, no further answer herein to Q-4 appears necessary, except to point out that it would appear that Step III above-described, in the circumstances of this matter, would not be subject to further administrative procedures, whatever the decision of the said Acting Chancellor was on his review under Step III.

Dated this 11th day of February, 1980.

/s/

LEON M. SCHUR, Acting Chancellor of the University of Wisconsin-Milwaukee, and one of the above-named defendants.

Subscribed and sworn to before me this 11th day of February, 1980.

/s/

Notary Public, State of Wisconsin

My Commission: is permanent.

Dated this 11th day of February, 1980.

/s/

ROBERT W. CORRIGAN, Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, one of the above-named defendants.

Subscribed and sworn to before me this 11th day of February, 1980.

/s/

Notary Public, State of Wisconsin

My Commission: is permanent.

Dated this 11th day of February, 1980.

/s/

EMANUEL RUBIN, Chairman of the Department of Music of the University of Wisconsin-Milwaukee, one of the above-named defendants.

Subscribed and sworn to before me this 11th day of February, 1980.

/s/

Notary Public, State of Wisconsin

My Commission: is permanent.

THE UNIVERSITY OF WISCONSIN–MILWAUKEE P.O. Box 413, Milwaukee, Wisconsin 53201
OFFICE OF THE CHANCELLOR
414-963-4331

October 29, 1980

Professor Paul Kramer
Department of Music
University of Wisconsin-Milwaukee

Dear Professor Kramer:

I am writing to inform you of my decision regarding your petition wherein you appealed the determination of the Music Department Executive Committee which sustained your reassignment from the Woodwind Arts Quintet.

In November, 1977, your fellow members of the Quintet informed you, while you were still a member, that your playing was unacceptable to them. After this November meeting, those Quintet members continued in rehearsals but the problems associated with your participation remained. At a meeting in February of 1979 you were again informed by the other members of the Quintet that your playing continued to be unacceptable. Finally, on July 21, 1979, some twenty months after the initial meeting, you were informed of the unanimous decision of the other members of the Quintet to ask for your resignation. Unwilling to accept this unanimous decision, you informed Music Department Chairman Rubin that you were unwilling to resign. Chairman Rubin then took steps to transfer you from your role as a member of the Quintet. Unsatisfied with Chairman Rubin's decision, you sought the assistance of the University Committee. The University Committee responded, recommending that the more appropriate step at that time would be to take the matter to the Executive Committee. You did this. A meeting was held on September 18, 1979, at which time all interested parties were invited to participate. The Executive Committee,

in a written determination, upheld the action of Dr. Rubin in reassigning you to full time teaching duties. This matter has now been presented to my office.

The pivotal question which you have presented involves the concept of due process. The essential elements of due process include notice and the opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case. You have suggested that Wisconsin Administrative Code section UWS 6.01 applies to your case and thus that you are entitled to "hearings" of the types mandated by that provision. (See section 5.42 - 5.46 UWM Policies and Procedures.) You also contended that your reasssignment from the Woodwind Arts Quintet to full time teaching duties was in the nature of "discipline", which would then bring Chairman Rubin's action within the guidelines of Wisconsin Administrative Code section UWS 6.01.

I am not in agreement with your position. What occurred was not an act of discipline but rather a reassignment of time. The Executive Committee held this to be well within the authority of departmental chairpersons, and I feel that the judgment of the Executive Committee was proper.

Since Dr. Rubin's authority to assign duties is at all times subject to review by the Executive Committee, and since you have availed yourself of the right to appeal to that faculty body, the due process right to be heard and defend in an orderly proceeding adapted to the nature of the case has, in my judgment, been satisfied. I can not therefore agree with your contention that you were denied due process.

You have further contended that it is beyond the power of the Department Chairman to dismiss you from the Quintet. Clearly this is not the case. As was noted by the Executive Committee, the Woodwind Arts Quintet is not an entity completely independent of the Department of Music although personnel changes must be within the primary jurisdiction of the Quintet. Faculty music groups are voluntary associations

working toward common musical goals. Members of such groups must be encouraged to exercise independent artistic judgment and control over their musical emphasis as well as their membership. The Executive Committee was satisfied that adequate professional reasons existed for the reassignment request by the Quintet and that the action taken by the Chairman constituted a correct decision for the good of the Department. It is well known that, upon review, an administrative decision will not be overturned if it is supported by substantial evidence as a reasonable mind might accept as adequate to support the conclusions of the Executive Committee, and therefore, I hereby uphold the decision of the Executive Committee regarding the Quintet's actions.

Finally, you have argued that, by its action, the Quintet is depriving you of a significant property interest. As stated earlier, faculty music groups are voluntary associations and their membership is internally governed along artistic lines. Furthermore, while it may be true that the Woodwind Arts Quintet members might augment their salaries in this way, it is not the function of the Quintet to earn additional salary for its members. This benefit is incidental to their musical and recruitment value and to the good they perform for the reputation of the school and for its musical educational program. Therefore, it is clear that no member of the Woodwind Arts Quintet has a vested property interest in his membership in the Quintet.

Sincerely,

/s/
Frank E. Horton
Chancellor

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY - BRANCH 18
CIVIL DIVISION

PAUL KRAMER,

Plaintiff,

v. Case No. 499-335

LEON M. SCHUR, Acting Chancellor of the University of Wisconsin-Milwaukee,

ROBERT W. CORRIGAN, Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, and

EMANUEL RUBIN, Chairman of the Department of Music of the University of Wisconsin-Milwaukee,

Defendants.

The Court, having received all of the Motions of the Defendants to Dismiss the Amended Complaint, does hereby deny the aforementioned motions.

The Defendants shall answer the Amended Complaint within twenty (20) days of the date of this Order.

Dated this twenty sixth day of February.

BY THE COURT:

/s/

Harold B. Jackson, Jr.

STATE OF WISCONSIN MILWAUKEE COUNTY
CIRCUIT COURT - CIVIL DIVISION

PAUL KRAMER,

Plaintiff,

v.

LEON M. SCHUR, Acting Chancellor of the University of Wisconsin-Milwaukee,

ROBERT W. CORRIGAN, Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, and

EMANUEL RUBIN, Chairman of the Department of Music of the University of Wisconsin-Milwaukee,

Defendants.

DECISION

Case No. 499335

This matter was tried to the Court without a jury. After consideration of all of the records, files, and proceedings, the Court has concluded that Plaintiff, Paul Kramer, a tenured professor in the Department of Music at the University of Wisconsin-Milwaukee, was denied due process of law by the manner in which he was reassigned to full-time teaching duties, effectively removing him from the Woodwind Arts Quintet.

The Court adopts the Stipulation of Facts submitted and signed by both counsel on April 10, 1983.

The Court, based upon the aforementioned Stipulation and the testimony in the record, does hereby make the following

Conclusions of Law:

(1) That Paul Kramer was denied due process of 'aw because he was not given an adequate hearing prior or subsequent to his reassignment to full-time teaching.

(2) That the hearing before the Executive Committee failed to meet the requirements of due process in the following respects:

(A) Plaintiff was never provided with a written statement for his reassignment from the Quintet.

(B) Plaintiff was not allowed to call his own witnesses or to cross-examine witnesses who spoke to the Committee.

The Court, having found that the Plaintiff was denied due process of law by the manner in which he was removed from the Woodwind Arts Quintet, does determine that further argument is needed to detrmine the appropriate remedy in this matter. Accordingly, the matter is scheduled for oral argument on this question on November 14th, 1983 at 8:30 A.M. in Room 508 of the Courthouse. Briefs are to be submitted to the Court according to the following schedule:

(A) Plaintiff's Brief is due on November 1st.

(B) Defendant's Brief is due on November 8th.

Dated this 24th day of October, 1983.

BY THE COURT:

/s/

HAROLD B. JACKSON, JR.
CIRCUIT COURT JUDGE

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

PAUL KRAMER,

Plaintiff,

v.

FRANK E. HORTON,
Chancellor of the University
of Wisconsin-Milwaukee,

ROBERT W. CORRIGAN,
Dean of the School of Fine
Arts of the University
of Wisconsin-Milwaukee,

GERALD T. McKENNA,
Chairman of the Department
of Music of the University
of Wisconsin-Milwaukee,

Defendants.

DECISION ON
MOTION TO AMEND

Case No. 499-335

The Court, having considered Plaintiff's request to amend the *Findings of Fact* and *Conclusions of Law,* does decide as follows:

1. That the amendment to the Court's October 24th decision which would add the phrase "of the reasons" following the word "statement" in Conclusion (2)(A) is granted by stipulation.
2. That a conclusion of law making explicit that Plaintiff has a liberty interest in not being forcibly removed from the Quintet under circumstances which severely impugn his professional reputation and employability in similar positions, is ordered to be added to the Court's *Findings of Fact* and *Conclusions of Law.*

3. That a finding of fact and conclusion of law to support an award of attorney's fees and costs in the amount of $38,654.47 is ordered to be added to the Court's *Findings of Fact* and *Conclusions of Law.*

Several matters deserve additional comment at this time. First of all, as to the Plaintiff's liberty interest, the testimony does indicate that the actions of the Defendants in removing Professor Kramer from the Quintet in the manner chosen diminished his reputation in the university music community and his employability as a performing chamber musician. Several highly credible experts testified to that effect on behalf of the Plaintiff. The Plaintiff, then, is entitled to a hearing to clear his name and reputation within sixty (60) days of the date of this decision pursuant to *Board of Regents v. Roth,* 408 U.S. 564 (1972).

Secondly, as to attorney fees and costs, the Court takes the position that even though the Plaintiff is clearly the "prevailing party" as to the ultimate merits of this lawsuit, some of the hours spent in preparation and argument of the Motion for a Preliminary Injunction, which was denied, should not be allowed. Considering the twelve factors expressed in *Johnson v. Georgia Highway Express, Inc.,* 488 F. 2d 714, 717-719 (1974) and subsequently adopted by the Seventh Circuit, the Court finds the following fees to be reasonable in this case:

(A) Atty. Ralph Ehlinger, 21 hours at $65.00 per hour	$ 1,365.00
(B) Atty. Dennis Fisher, 400 hours at $65.00 per hour	26,000.00
(C) Atty. Mary Newton, 40 hours at $40.00 per hour	1,600.00
(D) Atty. Susan Marquet, 161 hours at $50.00 per hour	8,050.00
(E) Costs of $1,639.47 allowed	1,639.47

The Court feels obligated to state that in its opinion the quality of representation of both Plaintiff and Defendants was clearly superior. The Court believes, however, that the hourly rate

awards made in this case, $40-65.00, represents a reasonable balance between compensation normally paid to counsel privately retained and that paid by governmental bodies for similar services rendered and the rates paid in similar cases.

Counsel for the Defendants is requested to draft an Order for Judgment and Judgment consistent with this and prior decisions of this Court for signature by the Court under the five day rule.

Dated this 1st day of February, 1984.

BY THE COURT:

/s/

Harold B. Jackson, Jr.,
Circuit Court Judge

(2)

No. 85-2034

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

PAUL KRAMER,

Petitioner,

v.

FRANK E. HORTON, CHANCELLOR OF THE UNIVERSITY OF WISCONSIN-MILWAUKEE, ROBERT W. CORRIGAN, DEAN OF THE SCHOOL OF FINE ARTS OF THE UNIVERSITY OF WISCONSIN-MILWAUKEE, and GERALD T. MCKENNA, CHAIRMAN OF THE DEPARTMENT OF MUSIC OF THE UNIVERSITY OF WISCONSIN-MILWAUKEE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRONSON C. LA FOLLETTE
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Wisconsin

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No. 85-2034

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAUL KRAMER,

Petitioner,

v.

FRANK E. HORTON, CHANCELLOR OF THE UNIVERSITY OF WISCONSIN-MILWAUKEE, ROBERT W. CORRIGAN, DEAN OF THE SCHOOL OF FINE ARTS OF THE UNIVERSITY OF WISCONSIN-MILWAUKEE, and GERALD T. MCKENNA, CHAIRMAN OF THE DEPARTMENT OF MUSIC OF THE UNIVERSITY OF WISCONSIN-MILWAUKEE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

REASONS FOR NOT GRANTING WRIT

A. State exhaustion requirement.

The issues outlined in the petition do not fulfill the criteria

for review laid out in Rule 17.1(b) or (c) and in the prior decisions of this Court. That is because they do not present a substantial federal question. Rather, the Wisconsin Supreme Court's decision to require exhaustion of available administrative remedies before commencing an action seeking relief under 42 U.S.C. § 1983 in state court was a matter of "judicial administration . . . [which is] rightfully subject to crafting by judges." Patsy v. Florida Board of Regents, 457 U.S. 495, 518 (1982) (White, J., concurring opinion). Moreover, such judicial craftsmanship is within the scope of the state's prerogatives

under the tenth amendment and has not been foreclosed by Congress.[1]

1. No congressional preclusion of state exhaustion rules.

Petitioner's reliance on Patsy's holding that plaintiffs need not exhaust state remedies before seeking relief under § 1983 in federal courts is misplaced in this case. In Patsy it is clear that a majority of the Justices did not find anything fundamentally wrong with an exhaustion rule as such, but

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[1] On page 12 of his brief, petitioner points to conflicts among state appellate courts on the exhaustion issue. This supposedly places this case within Rule 17.1(b)'s criteria for granting a writ of certiorari. However, the division of opinion among various states does not involve a conflict over a federal legal principle. It reflects only diversity of viewpoint on the matter of allocating judicial resources within the respective jurisdictions.

instead found that Congress had intended that aggrieved persons ought to have immediate access to federal courts to vindicate alleged violations of federally protected rights. Congress supposed that there was no state remedy, or if there was one, states would be unable or unwilling to protect individuals or punish violators. Patsy, 457 U.S. at 505. Federal courts were presumed to be havens for the unprotected. But plaintiffs were left to choose the haven believed most conducive of such protection; they could try the state courts or proceed directly to the federal courts for the "supplementary" § 1983 remedy. Patsy, 457 U.S. at 506. Since the § 1983 remedy was supplementary to the state remedy, Congress contemplated that state rules might impose procedural and evidentiary limitations not found in

a federal forum. Certainly, then, Patsy did not confer any substantive right to avoid exhaustion of state-created administrative remedies, but rather governed only the timing of a plaintiff's entry into federal court. As Justice Marshall put it:

> [The] legislative purpose . . . is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts.

Patsy, 457 U.S. at 501 (emphasis added).

In short, on September 4, 1979, the date petitioner filed his suit in state court, the doors of the federal court, just a few blocks down the street, remained wide open. Nothing in the Wisconsin Supreme Court's decision prevented petitioner from entering those federal doors. Its exhaustion rule, applicable to state courts only, does not

conflict with the no-exhaustion rule governing federal court jurisdiction.

2. No Supremacy Clause issue.

It is important to understand that the issue petitioner raises is not whether Wisconsin state courts must apply federal substantive law when entertaining a § 1983 action under their concurrent jurisdiction. That federal substantive law prevails is a point well understood and thoroughly emphasized in the Wisconsin Supreme Court's decisions. See Kramer v. Horton, 128 Wis. 2d 404, 383 N.W.2d 54 (1986) (Petitioner's Appendix at A-1); Terry v. Kolski, 78 Wis. 2d 475, 254 N.W.2d 704 (1977); U. S. Const., art. VI, cl. 2. But the promulgation of an exhaustion rule applicable to entry in state courts violates no federal substantive right

within the scope of the Supremacy Clause. Indeed, no federal question is presented when the state imposes the same procedural limitations on federal claims brought before it as it does on state claims.

Petitioner insinuates that the state's exhaustion rule somehow violates his rights of procedural due process and access to courts. See petitioner's brief, page 16. However, an exhaustion rule is not prohibited under the fifth or fourteenth amendment. If anything, such a rule merely defines and guides the timing and place of due process. This Court has not condemned state laws providing for a state administrative and judicial structure for the airing of grievances and the correcting of errors. In fact, those laws have been encouraged and been given substantial

deference in procedural due process cases. See Davidson v. Cannon, 106 S. Ct. 668 (1986); Daniels v. Williams, 106 S. Ct. 662 (1986); Hudson v. Palmer, 104 S. Ct. 3194 (1984). Those decisions teach that it is federal policy to defer to state procedures, even when the wrong consists of an alleged deprivation of property and liberty interests.

3. Federalism principles are not frustrated.

Petitioner asserts that the state's exhaustion rule frustrates principles of federalism. However, in so arguing, petitioner stands federalism on its head. The source of the state's authority to adopt an exhaustion rule is found in the tenth amendment. One of the state's sovereign prerogatives is the ability to structure its own internal affairs, including the

settlement of disputes amongst its state university faculty over teaching assignments and the allocation of its judicial resources.

Respondents submit the State of Wisconsin has an important interest in not only how, but also when claims for relief are dealt with in its judicial system, even when those claims are grounded in federal substantive law. The Wisconsin Supreme Court's concern for that principle is not of recent origin. In Tecumseh Products Co. v. Wisconsin E. R. Board, 23 Wis. 2d 118, 128, 126 N.W.2d 520 (1964), involving the issue of whether the Wisconsin Employment Relations Board had the authority to adjudicate labor-management disputes in terms of federal substantive law, the court said:

We now turn to the question of whether the W.E.R.B. is authorized to perform this function. The answer to this question depends upon state law. We consider that a state is free to allocate judicial power within its own boundaries as it sees fit, without thereby contravening any federal interests. We think this follows from Dreyer v. Illinois (1902), 187 U.S. 71, 83, 23 Sup. Ct. 28, 47 L. Ed. 79, when the United States supreme court stated:

> "A local statute investing a collection of persons not of the judicial department with powers that are judicial . . . presents no question under the Constitution of the United States. . . . Whether the legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State."

See also Uphaus v. Wyman (1959), 360 U.S. 72, 79 Sup. Ct. 1040, 3 L. Ed. (2d) 1090.

(Emphasis supplied.)

In this case, the state's exhaustion rule does not conflict with federal substantive law and presents no important federal question for consideration by this court.

B. Adequacy of available remedies.

Petitioner appears to be asserting that an exhaustion requirement is permissible only when there are adequate state remedies. That assertion raises no

reviewable case or controversy. The Wisconsin Supreme Court agrees that those remedies must be adequate and so found in this case.

If, on the other hand, petitioner is arguing that, on the facts of this case, the remedies were inadequate, then his petition should be denied for two reasons. First, petitioner has made no record of the alleged inadequacy. That the available administrative remedy did not yield the result he desired does not mean it was violative of due process.

Second, whether or not those remedies were adequate in light of the interests and circumstances involved is an issue of fact and does not present a substantial federal question.

CONCLUSION

For the reasons set forth above, the petition should be denied.

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SUPREME COURT OF THE UNITED STATES

PAUL KRAMER *v.* FRANK E. HORTON, ETC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 85–2034. Decided October 20, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

This case presents the issue whether exhaustion of state administrative remedies is a prerequisite to bringing an action in state court under 42 U. S. C. § 1983. In this case, the Wisconsin Supreme Court held that state administrative remedies must be exhausted before bringing an action under § 1983 in Wisconsin state courts. For the reasons stated in my previous dissent from denial of certiorari in *Caylor* v. *City of Red Bluff*, 474 U. S. —— (1985), I would grant certiorari.